88-279

Supreme Court, U.S.
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No. 87-2546

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A.D., 1988

LESTER D. ANTRIM, et al.,

Petitioners,

vs.

BURLINGTON NORTHERN, INC., A CORPORATION, and the UNITED TRANSPORTATION UNION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOHN L. DAVIDSON, JR.
721 Olive Street
St. Louis, Missouri 63101
(314) 241-5735
Counsel of Record

HOMER J. TICE
101 East Douglas Street
Petersburg, Illinois 62675
(217) 632-2281
Counsel for Petitioner

SCHNEPP & BARNES PRINTERS, INC., SPRINGFIELD, ILL.

QUESTIONS PRESENTED

1. Do railroad workers have a remedy in the federal courts against their union and the railroad when the union secretly, and against the wishes of the local union chairman, signed away the job protection guaranteed the workers' in a railroad merger?

2. Are those workers entitled to have a jury pass on their claims rather than have them disposed of by summary judgment?

LIST OF PARTIES

The parties to the proceedings below were Lester D. Antrim, Tom M. Bell, Wendell Bollinger, Mark B. Bredehoft, Kim L. Crisman, Marion E. Chubick, Larry L. Crenshaw, Daniel L. Doolin, Philip A. Douglas, Richard L. Ferzely, Harry L. Fishel, David Fisher, John O. Gregory, Roger Kent Haberman, Steven J. Harris, Allen L. Hendricks, Lowell K. Higgins, Oliver F. Hood, George M. Hutton, John R. Hymes, Richard L. Kays, Donald R. Kell, Wayne J. Kight, Morris H. Lancaster, Jr., Donald Eugene Looker, Ronald L. McClure, George Robert Middleton, Rick D. Mitchell, Bruce D. Myers, J. Kenneth Phelps, R. B. Rainville, Kenneth A. Robertson, Virgil G. Schlueter, Larry A. Schnake, David A. Shrumanski, Nolan L. Smith, Martin S. Thomas, Richard A. Vermillion, Richard D. Zillion, Gary P. Zima.

The respondents before this Court are Burlington Northern, Inc., a corporation and United Transportation Union, a certified bargaining agent for railroad workers on the Burlington Northern Railroad.

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Petitioners, Lester D. Antrim, et al., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on May 17, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 847 F 2d 1375 and is reprinted in the appendix hereto, p. App. 1, *infra*.

The memorandum decision of the United States District Court for the Central District of Illinois (Mills, D. J.) has not been reported. It is reprinted in the appendix hereto, p. App. 9, *infra*.

JURISDICTION

Invoking federal jurisdiction under Chapter 8 of Railway Labor Act, Title 45, § 151 et. seq., U.S.C.A. Title 28 § 1331 U.S.C.A., petitioners brought this suit in the Central District of Illinois on September 19, 1984. The Central District granted respondent's motion for summary judgment and for other relief. See. p. App. 31, *infra*.

The Seventh Circuit on May 17, 1988 entered a judgment and an opinion affirming the District Courts order. No petition for rehearing was filed.

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

(§ 11347) *Employee protective aggrangements in transactions involving rail carriers.* When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45. Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period). Pub. L. 95-473, Oct. 17, 1978, 92 Stat 1439.

STATEMENT OF THE CASE

Petitioners, all members of the United Transportation Union ("UTU"), and at all relevant times employees of the Burlington Northern, Inc. ("BN"), a carrier by rail, brought this class action against the UTU as their exclusive bargaining agent, and the BN.

This cause of action arises under Chapter 8 of the Railway Labor Act (45 U.S.C. § 151 *et seq.*) U.S. Code Annotated. Federal jurisdiction was asserted under Section 1331, of the Judicial Code (28 U.S.C. § 1331). In addition, under pendant jurisdiction petitioners asserted common law claims against defendants UTU for negligent interference with plaintiffs' contractual rights and for violating its duty to plaintiffs and against the BN for breach of contract.

BN had merged with the Saint Louis-San Francisco Railway Company ("Frisco"). In connection with the proceedings before the Interstate Commerce Commission seeking approval of this merger, BN entered into an agreement with the UTU by which any employee adversely affected by a change in operation, services or facilities, due to the merger would have protection against loss for six years from the date of merger.[1]

Petitioners worked out of Beardstown, Illinois and Centralia, Illinois. The Beardstown corridor, by means of an interchange at Centralia, provided a gateway between BN cities in the west and northwest and cities of the south and southeast.

After the merger was approved but before its effective date, November 21, 1980, petitioners believed that BN and Frisco were diverting traffic from the Beardstown corridor. After the merger, some of the employees noticed that traffic which had formerly moved on the Beardstown corridor

1. This differed from the protection given workers when the BN was formed by merger of the former Chicago Burlington and Quincy lines, the Great Northern and the Northern Railway. In that case all were protected against any reduction in force.

through Illinois was moving on the BN lines west of the Mississippi to St. Louis, thence south on the old Frisco lines to Memphis to the South. Similarly the merged railroad changed its routing of northbound traffic. Formerly traffic from the South moved through Centralia. After the merger it was carried over via the old Frisco line to St. Louis, thence North on the West bank of the Mississippi.

The UTU filed claims on behalf of the men first affected by the diversion. The Public Law Board which heard the claim of Mr. R. E. Shores found that there had been a diversion and directed the UTU and the BN to reach an agreement as to men affected. The UTU by its general chairman executed a letter agreement drafted by the BN in January, 1983, determining the only affected employees were those displaced on December 11, 1980.

The agreement, drafted by the BN and written in its office, was signed by the UTU general chairman over the protest of the chairman of the UTU local at Beardstown.

The UTU did not distribute the agreement, except to the eleven men who were affected on December 11, 1980 and received protection.

Thereafter men senior to the December 11, 1980, eleven who were adversely affected by the BN's diversion from the Beardstown corridor and made claims through the UTU for benefits under the merger agreements which were denied by the BN and by the administrative hearing board. Their basis for the administrative determination was the BN drafted agreement of January and September, 1983, denying them protection.

The men first learned on August 20, 1984 that UTU had terminated their rights without notification to them.

They filed this action in the U.S. District Court for the Central District of Illinois on September 19, 1984. The trial court certified it as a class action on July 29, 1985. The motion of UTU and BN for summary judgment was granted on August 21, 1987 by Richard Mills, United States District Judge. That memorandum appears at Appendix, p. App. 31, *infra*.

REASONS FOR GRANTING THE WRIT

I

The decision below upholds an agreement between the union and the carrier which deprives workers of even the statutory minimum protection and conflicts with other circuits.

This case presents an important question of the rights of railway union members to remedy the wrongs they perceive done them. There is a marked conflict between circuits as to the question of proof required for a member of a union to show violation of the union's duty of fair representation. The Seventh Circuit says: ". . . only discrimination or other *intentional* misconduct violates the duty of his representation". (emphasis supplied) *Antrim et al. v. Burlington Northern, Inc. et al.*, 847 F. 2d 375, 378, appendix p. 00, *infra*.

This contrasts with decision of other circuits. The Tenth Circuit held that the district court had jurisdiction of a suit by employees against their union and the rail carrier. 10 Cir., *Richins v. Southern Pac. Co.*, 620 F. 2d 761, 763 (1980). In *Childs v. Pa. Fed. Broth of Maintenance Way Emp.*, 3 Cir., 831 F. 2d 429 (1987), it was held that an employee could sue both the union and the carrier.

The agreement between BN and UTU on job protection when approved in the Interstate Commerce Commissions order approving the merger became an integral part of the merger approval. (*Norfolk & Western Co. v. Nemitz*, 404 U.S. 37, 43). The Sixth Circuit's decision, *Nemitz v. Norfolk & Western Co.*, 436 F. 2d 841, which this Court affirmed, held the right of the railroad workers to sue for damages resulting from a breach of that agreement.

The Sixth Circuit has also held that federal courts have jurisdiction over a workers claim for damages arising out of a post merger agreement affecting the rights of the workers. (*Bundy v. Penn Central Company*, (6 Cir.) 455 F. 2d 277).

The vice in the Seventh Circuit decision is that when the union and the railroad rewrote the job protection contract after approval of that agreement by the Commission the petitioners were deprived of a remedy in the Seventh Circuit which they would have had elsewhere. By shopping for a favorable forum they could have pursued the respondents. Such a procedure is absurd. They must go from their home and from the sites of pertinent records.

Rather than conforming with national policy, the Seventh Circuit Balkanizes the policy of Congress so that rights are dependent upon geography, not federal policy.

II

Determining the rights of workers in summary judgment directly deprives them of an opportunity to have a jury draw inferences from the action of the union and the carrier.

Had the trial court and the Court of Appeals not set a false standard the workers could have had a jury draw inferences favorable to their cause and make the decisions. The plaintiffs are entitled to reasonable inferences to aid their complaint. (*Quinones v. United States*, 3 Cir., 492 F. 2d 1269, 1273. (1974))

CONCLUSION

In this case the union secretly entered into an agreement drafted by the railroad which saved the railroad from job protection payments and deprived the men of 97 percent of the promised protection and all of the statutory minimum protection. The agreement was an absolute bar to administrative relief. The court below has deprived them of a remedy. This Court should reverse and bring the Seventh Circuit into conformity with the other circuits. In any event even if the Draconian test of "intentional" were proper, a jury should have been permitted to consider all of the circumstances surrounding the agreement and draw inferences from them.

The judgment below should be reversed and the case remanded for trial.

Respectfully submitted,

By: /s/ JOHN L. DAVIDSON, JR.
721 Olive Street
St. Louis, Missouri 63101
(314) 241-5735
Counsel of Record

HOMER J. TICE
101 East Douglas Street
Petersburg, Illinois 62675
(217) 632-2281
Counsel for Petitioner

APPENDIX I

In the
United States Court of Appeals
For the Seventh Circuit

No. 87-2546

LESTER D. ANTRIM, et al.,

Plaintiffs-Appellants,

v.

BURLINGTON NORTHERN, INC., and UNITED TRANSPORTATION UNION,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois, Springfield Division.
No. 84-3375—**Richard Mills**, *Judge.*

ARGUED MARCH 29, 1988—DECIDED MAY 17, 1988

Before CUMMINGS, FLAUM, and EASTERBROOK, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* When the Burlington Northern Railroad acquired the St. Louis-San Francisco Railway in 1980, it had to provide for the protection of employees affected by the transaction. 49 U.S.C. §11347. It negotiated with several unions, including the United Transportation Union (the Union), an agreement incorporating the *New York Dock* conditions, named after *New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979). The *New York Dock* conditions require the railroad to compensate its employees in the event the merger causes a harmful diminution or diversion of traffic. The union or

employee must demonstrate (1) diversion or diminution, (2) effect on the employee in question, and (3) detriment, which generally means wages lower than the employee earned in a prior period. If the railroad rejects a request for compensation, the union may take the claim to arbitration under the Railway Labor Act, 45 U.S.C. §153 First (i), and if still dissatisfied may ask the Interstate Commerce Commission for review. *Chicago & North Western Transportation Co.—Abandonment—Near Dubuque and Oelwein, Ia.*, ____ I.C.C. 2d ____ (Apr. 17, 1987); *Atlantic Richfield Co. and Anaconda Co.—Control—Butte, Anaconda & Pacific R.R. and Tooele Valley R.R.*, ____ I.C.C. 2d ____ (Feb. 17, 1988). Judicial review is forbidden by 45 U.S.C. §153 First (q) unless the arbitrators failed to comply with the Railway Labor Act, exceeded their jurisdiction, or perpetrated "fraud or corruption". *Union Pacific R.R. v. Sheehan*, 439 U.S. 89 (1978). (The extent to which the ICC may (or must) review decisions in cases arising out of labor-protection conditions is the subject of pending petitions for judicial review, and we express no opinion on it.)

Some of the Union's members in central Illinois noticed that fewer and shorter trains were passing through their territory after the merger, and they sought compensation. The Railroad replied that a downturn in business had caused the shortfall, and that the merger was not responsible. The Union disagreed. In April 1982 the Union and the Railroad submitted some claims to a panel under the Railway Labor Act, in the expectation that the decision would set the pattern for similar claims. The majority of Public Law Board No. 3160 concluded that the merger led to the rerouting of a single daily train away from the territory in question and invited the parties to settle their dispute on that basis. In January 1983 they did so, signing an agreement designating ten employees as "affected" by the displacement of traffic, and eight of these ten as injured during the months covered by the award. Since the settlement, the eight have been receiving monthly benefits; some other employees also receive benefits under

labor-protection agreements predating the 1980 merger. (These older agreements do not require proof that the lost work was attributable to the merger, but they apply only to employees working when the earlier mergers occurred.) No other employees have received payments on account of the 1980 merger or any reduction or displacement of traffic it may have caused.

Many members of the local union were dissatisfied and continued to submit claims for compensation. These fall into three groups. (1) The two employees deemed "affected" by the rerouted train but not "displaced" during the months covered by the award sought compensation for other months when, they said, they had lost wages. (2) Employees not among the ten deemed "affected" by the rerouting contended that they, too, had lost work as a result of the shift. (3) Still other employees continued to insist that the merger had rerouted more than one train out of their territory, and they wanted compensation for the loss they perceived. The record is unclear about which of these persons protested, when, and to whom; we need not resolve any disputes of this character. The Union asked the Railroad to recognize the validity of the claims; the Railroad refused, contending that the whole subject was closed by the January 1983 settlement.

In early 1984 the Union took a second group of cases to arbitration. It pressed claims in the first two categories, apparently abandoning hope of persuading a panel that more than one train had been diverted. Special Board of Adjustment No. 918 held in August 1984 that the earlier award, plus the settlement, disposed of all possible claims in the first two groups. Asked to set aside both the earlier decision and the settlement on a number of grounds, Board No. 918 refused. No one asked the ICC to review this decision, and none of the three grounds of judicial review is present.

The employees in central Illinois instead filed this class action in late 1984 against both the Union and the Railroad, contending that the Railroad violated the agreement

of 1980, and the Union violated its duty of fair representation. This "hybrid" contract-duty of fair representation suit is governed by a six-month statute of limitations, and it is unlikely that the suit is timely, since as Board No. 918 held everything of substance was over and done with in January 1983. See *Bonds v. Coca-Cola Co.*, 806 F.2d 1324 (7th Cir. 1986). The district court nonetheless rejected the plaintiffs' claim on the merits, and as a defense based on the statute of limitations is not jurisdictional we need not reach the question, for we agree with the grounds on which the district court resolved the case.

This court has no power to review the merits of decisions of arbitral panels under the Railway Labor Act. See *Sheehan* and, e.g., *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320 (1972). A contention that the union violated its duty of fair representation questions the inputs into the arbitral process rather than the panels' decisions, however, and may be maintained under the jurisdiction granted by §301 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §185. *Czosek v. O'Mara*, 397 U.S. 25 (1970); *Graf v. Elgin, Joliet & Eastern Ry.*, 697 F.2d 771 (7th Cir. 1983)—at least to the extent it seeks relief against the Union, an important qualification to which we return.

As a suit against the Union, however, this case is doomed by *Graf* and the many other decisions of this court holding that only discrimination or other intentional misconduct violates the duty of fair representation. E.g., *Grant v. Burlington Industries*, 832 F.2d 76 (7th Cir. 1987); *Camacho v. Ritz-Carlton Water Tower*, 786 F.2d 242 (7th Cir. 1986), both collecting still more cases. The district court properly granted summary judgment to the Union, because there is no dispute about any *material* fact. Representation is "fair" even if ineffectual; the union may choose to devote resources to projects other than processing grievances, with the consequent diminution in the quality of contract administration. Negligence, even gross negligence, is not "unfair" representation. Unless the union's hierarchy is out to get the complaining members—perhaps

on prohibited grounds such as race, perhaps because of political squabbles within the union—a failure to handle a claim skilfully or successfully is not a source of legal liability.

The plaintiffs do not claim that the Union took their race, politics, or other prohibited criteria into account. It seems unlikely that internecine disputes account for the outcome; among the losers was the president of the local union, whose claims have been rejected consistently. The Union has gone to arbitration twice, the second time in an effort to extend the extent to which it had prevailed before the first panel. There is a genuine dispute about the cause of the diminished work in central Illinois; the first panel agreed with the Union in part and with the Railroad in part. The Union has not had the success for which its adherents hoped, but this is hardly a ground of liability. A union also might be liable to its members for dishonoring a more specific contractual promise, see James D. Holzhauer, *The Contractual Duty of Competent Representation*, 63 Chi.-Kent L. Rev. 255 (1987), but none has been urged in this case.

Perhaps the Union erred by basing the settlement of January 1983 on only two months' work, which forever denied benefits to two workers deemed "affected" but not "displaced" in those months and to any workers who were not "affected" in those months but could be in the future. But any settlement is a compromise in which each side gets less than its maximum objective. The record contains nary a clue that this settlement was drafted as it was in order to disadvantage unpopular members of the union, or otherwise depended on forbidden grounds of action.

Plaintiffs' evidence of intentional misconduct (taken in the light most favorable to them) is principally a string of unfulfilled promises by the president of the local and the representative of the international, who kept urging the members to submit claims for benefits and implied they would get results. Exaggerated promises—perhaps in an effort avoid unrest that might be reflected at the ballot box in union elections—are not the sort of "inten-

tional" wrongdoing with which *Graf*, *Camacho*, and similar cases are concerned. Lying to the members (if that is what happened) is far removed from invidious discrimination among them. It is the use of forbidden grounds of decision that creates a legitimate claim of "unfair" representation. The other bits of evidence do not carry the day. The plaintiffs complain, for example, that the president of the local did not post the January 1983 settlement agreement but instead discussed it at a meeting. Edgar Allen Poe made a nice tale out of the stratagem of hiding something by putting it just where people would look first, and perhaps the president of the local had this in mind. Apparently the last place where the members of this local expect to receive important information is at a meeting—which may be why, the record discloses, the local's meetings are sparsely attended. Still, it is hardly a breach of the duty of fair representation to suppose that information of general interest to the members might be revealed at their meeting. The plaintiffs also insist that the Union's bad faith appears in the fact that the settlement agreement did not dole out benefits in seniority order. Doubtless many benefits go by seniority; the *New York Dock* conditions, however, direct benefits to those actually injured by rerouted or reduced traffic. The settlement agreement was an effort (whether successful is not our province to say) to implement an arbitral award applying *New York Dock*. That it did not implement some competing vision of how benefits ought to be awarded is irrelevant.

So the claim against the Union fails. We held in *Graf*, 697 F.2d at 781, and *Frandsen v. Brotherhood of Railway Clerks*, 782 F.2d 674, 684 (7th Cir. 1986), that when this happens, the claim against a railroad employer must be dismissed for want of jurisdiction. The district court followed that path. This means we can avoid a host of jurisdictional problems unique to hybrid contract-duty of fair representation litigation under the Railway Labor Act. A railroad is not an "employer" for purposes of §301, see 29 U.S.C. §152(2) and (3), so jurisdiction must come from elsewhere. In hybrid cases under §301, employers may

be called on to pay the portion of the loss caused by their breach of contract, see *Bowen v. Postal Service*, 459 U.S. 212 (1983); *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976), yet under 45 U.S.C. §153 First (q) a court may not declare that the railroad *has* broken its contract unless one of the three conditions is satisfied, even if it otherwise has jurisdiction. *Czosek*, 397 U.S. at 29-30, therefore reserved the question whether a railroad employer may be held liable. The situation gets even knottier when primary jurisdiction to review any disputes about the railroad's obligations lies in the ICC, see *United Transportation Union v. Norfolk & Western Ry.*, 822 F.2d 1114 (D.C. Cir. 1987); *Baustein v. Pan American World Airlines*, 828 F.2d 546, 549, 551-52 (9th Cir. 1987); *Zapp v. United Transportation Union*, 727 F.2d 617, 627 n.16 (7th Cir. 1984); *Augspurger v. Brotherhood of Locomotive Engineers*, 510 F.2d 853 (8th Cir. 1975). There may be federal-question jurisdiction, based on federal common law (see *Graf*, 697 F.2d at 776-77), when the union and railroad are in cahoots, see *Glover v. St. Louis-San Francisco R.R.*, 393 U.S. 324 (1969), but the extent of this jurisdiction is unclear at best—as is the question whether bare "jurisdiction" permits a remedy given §153 First (q)—and the proper rule when the ICC has primary jurisdiction is even murkier. The Railroad has presented these thorny questions for decision. Since the claim against the Union must be dismissed, any basis of jurisdiction over the Railroad dissolves, and we need not address other potential jurisdictional flaws.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX II

IN THE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS —
SPRINGFIELD DIVISION

LESTER D. ANTRIM, et al., Plaintiffs,

v.

BURLINGTON NORTHERN, INC., et al., Defendants.

NO. 84-3375

ORDER

MILLS, District Judge:

In this cause of action, Plaintiffs allege a breach of their merger protection agreement with the Burlington Northern Railroad. The action arises under 45 U.S.C. § 151 *et seq.*, Chapter 8 of the Railway Labor Act, 28 U.S.C. § 1331, and state law.

Plaintiffs are railway employees "including but not limited to firemen, conductors and brakemen of the Burlington Northern Railroad on or before November 21, 1980," and were granted class standing on July 29, 1985. Defendants are the United Transportation Union (Union) and Burlington Northern, Inc. (Burlington).

Plaintiffs' complaint alleges that the Union, Plaintiffs' exclusive bargaining agent, breached an implied statutory duty of fair representation in its handling of their claims against Burlington. Plaintiffs also allege state law claims including: negligence, negligent and intentional interference with contractual rights, and knowing and willful inducement of Burlington's breach of contract.

Pursuant to Fed. R. Civ. P. 56, both Burlington and the Union have moved for summary judgment. Plaintiffs have requested oral argument on the motions and have moved for an order compelling further discovery. We do not believe oral argument will be helpful in resolving the issues before the Court; therefore, the motions are considered upon the parties' written filings.

I

As allowed by federal labor laws, Burlington and the Union signed a "merger protection agreement" (MPA) on March 25, 1980. The agreement essentially provided for the compensation of workers whose hours were reduced by a railroad merger that causes rail traffic to be diverted to another rail line. Such a merger in fact occurred here: the Burlington Northern and Frisco Railroads merged into the Burlington Northern Railroad on November 21, 1980.

All of Burlington's employees were "covered" by the MPA for a six year period. Nevertheless, in order to receive compensation for reduced work hours caused by the merger, a railroad employee is required by the agreement to prove three things: first, that the merger caused rail traffic to be diverted to another rail line (a "transaction"); second, that the employee was personally "affected" by the transaction; and third, that the affected employee was "displaced" (earning less income or placed in a worse position). (*See* Merger Protection Agreement and Implementing Agreement No. 1 between Burlington Northern, Inc., Frisco, and United Transportation Union, Doc. 1, Plaintiffs' complaint, Exhibit A).

Under the MPA, any aggrieved employee can submit a claim to the Burlington Northern Railroad. A rejected claim is then sent to the local union chairman who is required to forward the claim to the General Chairman of the Union. The Union and Burlington could then agree to arbitrate the claims before a Special Law Board or a Special Board of Adjustment.

In late 1980, employees of the Centralia-Beardstown-Galesburg line of the Burlington Northern began to notice a substantial decrease in rail traffic, and some submitted claims. These claims were forwarded to their local union representative, M. G. McClenning. Pursuant to the routine discussed above, McClenning processed these claims to G. D. Hitz, the General Chairman of the Union. The employees' claims were denied by Burlington on the ground that there was no diversion of rail traffic to another line; instead, the General Chairman concluded that rail traffic had declined due to poor business conditions.

After its initial failure with Burlington, the Union decided to take "pilot" claims before Public Law Board #3160 on April 2, 1982. In a "pilot" claim, a union pursues the best claim, hopefully to a successful conclusion, and then settles other similarly situated parties based on the one successful claim. With respect to the pilot claim in issue, the Public Law Board — composed of a representative of Burlington Northern, a representative of the United Transportation Union, and a neutral party who cast the deciding vote — ordered the parties to attempt a settlement of the employees' grievances.

In a written decision, the Board reported the arguments advanced by both the Union and Burlington. The neutral party, Dolnick, writing for the Board, focused his findings of diverted traffic solely to train P.B.F., (Pacific Northwest to Kansas City-Memphis-Birmingham-and beyond) but stated that he did not have enough information to make a definite decision on the claim. Neutral Dolnick ordered the Union and Burlington to attempt to settle this particular claim in conformity with seniority rules. He retained jurisdiction for 120 days in the event no settlement was reached.

Subsequently, Burlington proposed a settlement to the United Transportation Union on January 31, 1983. Under the settlement, ten employees were found to be "affected" em-

ployees, and since all but two of these employees had earned less than usual during this period, eight were also found to be "displaced" employees entitled to compensation. It was agreed that the two employees not "displaced" should not receive compensation under the terms of the merger protection agreement. The Union's General Chairman Hitz agreed to this settlement. The Union, however, continued to ask employees to file their claims.

Near the end of 1983, some of the railroad employees retained legal representation. Counsel for the workers drafted a letter and sent it to Hitz on December 23, 1983. The letter spoke of the claim of R. E. Shores before Public Law Board #3160, but did not mention the settlement agreement of January 31, 1983. The letter demanded that the Union process the employees' claims in an expeditious manner so the claims could eventually be appealed.

In early 1984, the Union brought additional claims before Special Board of Adjustment No. 918, which rendered its decision on August 20, 1984. Among the claims resolved by the decision was Claim #2 of H. L. Fishel, one of the two men found "affected" by diverted rail traffic but not "displaced." The Union brought Fishel's claim based on the same diversion, and the same "affected" status, but alleged displacement for a different month when Fishel earned less and could properly allege "displacement." The board, however, rejected his claim, stating that the January 31, 1983, agreement between the Union and Burlington precluded any redetermination of Fishel's "displaced" status.

The Special Board of Adjustment #918 likewise rejected claims by other Burlington employees. For instance, the claims of M. L. Smith, M. G. McClenning, H. D. Antrim, and E. M. Kroag — for displacement in *different* months after December 1980 and January 1981 but based upon the same diversion of traffic as found in P.L.B. #3160, Award #67 — were denied. In

rendering that board's decision, Neutral Edgett held that "the presentation of these claims to the board represents an effort to retry (Special Law Board #3160) Award #67 and to disregard understandings which form the basis for the January 31, 1983, letter agreement."

The Union's presentation to the board included an appeal that both parties had overlooked information and that the award and letter agreement were subject to review. Neutral Edgett was not, however, persuaded that information had been overlooked, and refused to reopen P.L.B. #3160, Award #67. Plaintiffs filed the instant suit on September 19, 1984.

II

Burlington first argues that the union employees' claims are barred by the statute of limitations. Movant maintains that Plaintiffs reasonably should have known about the suit as of the January 31, 1983, agreement and that is the latest date the statute commences. We cannot agree with that date and we disagree that this claim is barred by the statute of limitations.

The Seventh Circuit has stated that:

> This circuit, other federal circuits and the National Labor Relations Board have all held that breach by labor union of its statutory duty of fairly representing members is an unfair labor practice under the National Labor Relations Act. *Hall* v. *Printing & Graphic Arts Union, Local No. 3*, 696 F. 2d 494, 498 (7th Cir. 1982). Therefore, this Court applied to fair representation claims the limitation period for unfair labor practice complaints for the National Labor Relations Board. *Id.* The applicable statute states in pertinent part: provided . . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to filing of the charge with the board and a service of a copy thereof on the person against whom such charge is made . . . § 10(b) National Labor Relations Act, 29 U.S.C. § 160(b), *cited in*, *Metz* v. *Tootsie Roll Industries, Inc.*, 715 F. 2d 299, 302 (7th Cir. 1983).

More recently, the Supreme Court has concluded that the six months statute of limitations is applicable against fair representation cases. *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151, 169, 103 S. Ct. 2281, 2290, 76 L. Ed. 2d 476 (1983).

There is a standard which indicates exactly when there is notice of an alleged lack of fair representation. "The limitations period begins to run . . . when the claimant discovers, *or in the exercise of reasonable diligence should have discovered*, the acts constituting the alleged [violation]." *Hungerford v. United States*, 307 F. 2d 99, 102 (9th Cir. 1962) *cited in*, *Metz v. Tootsie Roll Industries, Inc.*, 715 F. 2d 299, 304 (7th Cir. 1983).

Movants argue that the statute of limitations began to run based on the January 31, 1983, settlement agreement between Burlington and the Union. There is evidence favorable to movants for summary judgment that Plaintiffs had ample notice of the effects of Public Law Board #3160, Award #67 and the accompanying settlement between Burlington and the Union. For example, a copy of the settlement was sent to local chairman M. G. McClenning by the Union. McClenning gave copies to some of those found affected and displaced. H. L. Fishel received a copy by going to Mr. McClenning's home. McClenning told about the settlement at a sparsely attended local union meeting. McClenning told other union members orally about the nature of the settlement. Employees spread rumors about the settlement. Employees retained legal counsel and a letter was sent to the Union on December 23, 1983, urging that claims be processed. In essence, the employees probably knew about the settlement, but did not know the actual affect of the settlement.

The employees could find out about Neutral Dolnick's determination in #3160. However, the employees would have difficulty in discovering the subsequent settlement of January 31, 1983, by Burlington and the Union. In addition, the scope of the settlement was not determined until the findings of Special Adjustment Board #918, Award #2 on August 20, 1984.

Plaintiffs persuade this Court that the statute of limitations begins later on August 20, 1984. Plaintiffs' argument rests upon the fact that the employees did not know about the settlement in #3160 until Special Adjustment Board #918. Plaintiff argues "the fallacy of the union's argument is clear since they in fact did take pilot claims *on behalf of all the Plaintiffs back to the Special Adjustment Board #918* for the purpose of obtaining merger protection for the Plaintiffs." (Plaintiffs' reply to motion for summary judgment Document #129, pp. 25-26). This argument has a reasonable basis since the Union presented more claims and tried to reopen other claims related to the transaction found in Public Law Board #3160.

A lengthier discussion ahead describes the findings of the neutral of Special Adjustment Board #918 and his refusal to reopen the findings of Public Law Board #3160 or review the settlement between Burlington Northern and the United Transportation Union. At this point, the Union is aware of, and the employees are capable of discovering, the true nature of the January 31, 1983, settlement between Burlington Northern and the United Transportation Union. It is here then that the statute of limitations must begin. Otherwise, the employees are placed in the impractical position of interpreting the settlement prior to the findings of Special Board of Adjustment #918.

Therefore, the claim of a lack of fair representation is not barred by the six months statute of limitations prescribed in *Del Costello*. Next, we turn to the claim that the employees lacked fair representation.

III

The employees claim that the Union breached its duty of fair representation. In addition, based on the lack of fair representation, the employees allege that Burlington acted in collusion with the Union to breach the merger protection agreement.

A union's duty of fair representation to its members is not explicitly found in any labor statute. Instead, the duty of fair representation is the result of much judicial interpretation of federal labor policies and § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. *See, e.g., Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151, 164, 103 S. Ct. 2281, 2290, 76 L. Ed. 2d 476 (1983); ("[The duty] is implied under this scheme of the National Labor Relations Act"); *Vaca v. Sipes*, 386 U.S. 171, 182, 87 S. Ct. 903, 912, 17 L. Ed. 2d 842 (1967) ("the duty stands as a bulwark to prevent arbitrary union conduct against individuals stripped of individual forms of redress by the provisions of federal labor law"). *See, Frandsen v. Broth. of Ry., Airline & S. S. Clerks*, 782 F. 2d 674, 678-79 (7th Cir. 1986).

The employees cannot bring a claim directly against Burlington because § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, does not apply to employers. *United Independent Flight Officers v. United Air Lines*, 756 F. 2d 1274, 1283 (7th Cir. 1985). In addition, the Railway Labor Act states, in no uncertain terms, that employees must refer disputes to the National Railroad Adjustment Board. 45 U.S.C. § 153, First (i), or may pursue arbitration through a law board or board of adjustment. 45 U.S.C. § 153, Second.

Any minor disputes relating to the merger protection agreement are decided by the expertise of the Interstate Commerce Commission and are not under the jurisdiction of this Court. Still:

> A fair representation claim, regardless of its factual context, is by definition a "non-minor" dispute since it involved the implied *statutory* relationship between a union and those it represents rather than the actual *contractual* relationship over which the National Railway Arbitration Board has jurisdiction.

Frandsen v. Broth. of Ry., Airline & S. S. Clerks, 782 F. 2d 674, 685 (7th Cir. 1986). Thus, although this Court does not have jurisdiction over a "minor" dispute, we do hold jurisdiction to hear non-minor disputes such as the instant claim that the railroad employees were not fairly represented.

Therefore, to prevail against either the company or the Union (the employees) . . . also carry the burden of demonstrating a breach of fair representation by the Union. *Hines v. Anchor Motor Freight*, 424 U.S. 554, 570-71 (1975). If the Railway Labor Act based duty of fair representation claim against the Union is dismissed, the claim against Burlington must also be dismissed. *United Indep. Flight Officers* at 1274, *citing Graf v. Elgin, Joliet & Eastern Ry. Co.*, 697 F. 2d 771, 781 (7th Cir. 1983). *See Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320, 92 S. Ct. 1562, 32 L. Ed. 2d 95 (1972).

Moreover, the remaining state law claims would have no federal law claim on which to base pendent jurisdiction and this Court would not have jurisdiction to hear the state law claims.

IV

The employees first assert that the Union misrepresented the progress of their claims under the merger protection agreement. In order to better understand the agreement itself, a brief review of the history of merger protection agreements is helpful.

The history of protective provisions for employees of merging or consolidating rail carriers is recounted in *New York Dock Ry. v. United States*, 609 F. 2d 83, 86-90 (2d Cir. 1979). In 1933, Congress enacted the Emergency Railroad Transportation Act which mandated a job freeze to guarantee continued employee for employees of consolidated railroads. Due to the effects this approach could have on operational efficiency, railroads and labor organizations agreed to a job security ar-

rangement that provided bargaining and compensation protection to employees, and allowed the railroads to reduce their work force. That agreement was the Washington Job Protection Agreement of 1936 (WJPA). In 1940, Congress amended the Interstate Commerce Act to include, *inter alia*, a labor protective provision modeled on the WJPA. 49 U.S.C. § 5(2)(f). That section was extensively revised in 1978 and recodified at 49 U.S.C. § 11347. *Cosby v. I.C.C.*, 741 F. 2d 1077, 1079 (8th Cir. 1984). The exact terms of the 1980 Burlington Northern and Union merger protection are modeled after 49 U.S.C. § 11347 and the so-called "New York Dock conditions."

The primary issue before us is whether the Union's behavior was intentionally deceptive and breached a duty of fair representation.

As the exclusive bargaining agent, the Union has an implied statutory duty to "fairly and without hostility or discrimination represent [their] grievance[s]." *Vaca v. Sipes*, 386 U.S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967). In this circuit, *Hoffman v. Lonza, Inc.*, 658 F. 2d 519 (7th Cir. 1981), sets forth the relevant legal standard used to determine a breach of duty of fair representation:

> *Hoffman* minimizes the occasions on which a federal district court has to take over the function of the arbitral boards and enforce a collective bargaining agreement. The court will do so only when the worker can prove intentional misconduct by the union in failing to prosecute his grievance.

Graf v. Elgin, Joliet & Eastern Ry. Co., 697 F. 2d 771, 781 (7th Cir. 1983). "*Hoffman* holds that a union breaches its duty to fairly represent a worker if it deliberately and unjustifiably refuses to represent that worker in processing a grievance. The union's misconduct must be intentional." *Superczynski v. P.T.O. Services, Inc.*, 706 F. 2d 200, 202 (7th Cir. 1983).

Recently, the Seventh Circuit has again emphasized that several cases including *Graf*, *Superczynski*, and *Dober v. Roadway Express, Inc.*, 707 F. 2d 292, 294 (7th Cir. 1983), hold that gross negligence alone is not a basis of liability. "A union may be liable if it discriminates against employees for forbidden reasons (such as race or politics, including the employee's position on the union and its leaders). It is not liable, however, for careless or boneheaded conduct." *Camacho v. Ritz-Carlton Water Tower*, 786 F. 2d 242, 244 (7th Cir. 1986), *cert. denied*, __ U.S. __, 106 S. Ct. 3282, 91 L. Ed. 2d 571 (1986).

Hoffman and other cases adopt a standard that precludes the courts from becoming embroiled in the merits of day-to-day employment decisions. The grievance and arbitration machinery is designed to place review in specialized tribunals.

Furthermore, the standard accommodates union employees such as Hitz and McClenning who have many duties in addition to handling grievances. They are not lawyers or private investigators. They may know the ins and outs of the collective bargaining agreement without having a trial lawyer's skills. A union could secure the skills and perseverance of a good litigation team but they would have to pay the steep fees these skills command in the market. A union may choose to rely on part-time, untrained, overworked grievers — with the inevitable difference in the outcome of some cases — rather than purchase a higher quality of representation. Therefore, "a wide range of reasonableness must be allowed a statutory bargaining representative serving the unit it represents." *Id.* at 244, 245, *citing Ford Motor Co. v. Huffman*, 345 U.S. 330, 338, 73 S. Ct. 681, 686, 97 L. Ed. 1048 (1953).

Implicit in the Union's and Burlington's motion for summary judgment is that the Union's conduct was in no way deceitful. For the purposes of summary judgment, we must look closely at the assertions made by Plaintiffs in their affidavit. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue of material fact that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Plaintiffs correctly maintain that the appropriate inferences must be drawn favorable to them:

> Where a choice of inferences is possible from summary judgment materials, the inference must be drawn that favors the party resisting summary judgment. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970); *United States v. Dieboldt, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962). We note also in this regard the sound axiom the questions of motive, design and intent are particularly inappropriate for summary adjudication.

Baldini v. Local U. No. 1095, Intern. U., etc., 581 F. 2d 145, 151 (7th Cir. 1978). *See also Miller v. Gateway Transportation Co.*, 616 F. 2d 272 (7th Cir. 1980).

In the present situation, Plaintiffs believe there were several failures on the part of the union, and maintain that those failures rise to the level of fraud, deceit and dishonesty required for lack of fair representation claim. Yet most of the Plaintiffs' depositions simply state the legal conclusion that the Union did not fairly represent them; of course, this cannot govern the Court's decision.

Nevertheless, there are several more specific allegations that deserve closer scrutiny, particularly when viewed in light of the summary judgment standard. These include the allegations of lies and of lack of notice; the allegation that Union officials deliberately ignored customary seniority rules; that the Union did not use all the information provided to it by employees; and that the January 31, 1983, settlement terminated all of employees' rights. Because of their importance to the issue of the Union's bad faith, we deal with each of these allegations in turn.

A. *Plaintiffs charge that Union officials lied to several employees.* First, Plaintiffs maintain that Union General Chairman Hitz lied to one of the Plaintiffs, H. Fishel, about Fishel's

status after the Public Law Board #3160, Award #67 and the January 31, 1983, agreement. "He (Fishel) was, according to Mr. Hitz, an affected employee, thus Mr. Fishel waited relying on the [Union's] representations. Yet the decision of the Special Adjustment Board #918 confirmed that his rights had been terminated by the United Transportation Union." (Document 129, Plaintiff's reply to U.T.U., p. 11-12).

Admittedly, Fishel was an "affected" employee as that term is defined by the MPA; nevertheless, he earned too much money while "affected" and therefore did not qualify as a "displaced" employee. Hence, Fishel deserved no compenstaion for December 1980 and January 1981. Moreover, the Union did later bring Fishel's claims for subsequent months before Special Board of Adjustment #918. Under these circumstances, Hitz' statements cannot be interpreted as evidence of bad faith.

Plaintiffs also say that Hitz contradicts himself about the Union's ability to bring more claims. (Plaintiff Document 109, p. 12 footnote #3). At most, however, Plaintiffs merely misunderstood what Hitz was telling them. On the one hand, Hitz told the employees that there will "be another law board." (*See* Hitz Deposition, p. 47). Although Hitz recognized that the January 31, 1983, settlement and the subsequent interpretation of this agreement in Special Adjustment Board #918 precluded bringing any claims related to the transaction of December 1980 and January 1981. During #918, the Union tried to reopen P.L.B. #3160 and the settlement but was not successful. Special Adjustment Board #918 held that additional claims may be brought.

Many employees said the Union lied to them about going back to the board after the initial settlement. Many of the reputed "lies" about what the Union planned to do, however, were merely misunderstandings resulting from gossip that abounded around the rail yard. As one employee, Richard Zillion expressed: "Some person is going to get this, and this

person is going to get that, and nothing has ever materialized about anything. Rumors . . . nothing." (Zillion Deposition). A number of employees claimed that false information came from local representative McClenning. (Depositions of L. Schnake, 41; N. Smith, 33; R. Zillion, 20; P. Douglas, 36-37; K. Robertson, 19). McClenning admits that he told the employees that the Union would continue to press their claims. (McClenning Deposition at 246, 247, 248, and 252). He did so on the basis of Hitz' statements of McClenning that the Union would go back to the Public Law Board. (McClenning Deposition, p. 247). This in fact occurred when the Union took "pilot" claims before Special Board of Adjustment #918. Moreover, Hitz promised to take future claims, and McClenning told the employees to "keep filing," which they did. (McClenning Deposition, p. 200, 248, 250).

Another concern is that the Union, in their overzealousness, told people that they were all protected and "taken care of." For example, Harry Fishel says that "Mr. Christiansen (the Union's Vice-Chairman) told me, and I quote, he said this is an ongoing thing and eventually he hopes to have everybody in Beardstown covered under the protection plan." (Fishel Deposition, p. 65). Of course, the word "hope" does not create the legitimate expectation that every employee will be covered by the MPA.

On the other hand, some of McClenning's remarks to employees are more specific. For instance, McClenning told several co-workers that the employees would get their "guarantees." (D. Schrumanski at p. 31, and Phelps at p. 26). However, McClenning's statements cannot support an inference of Union bad faith for two reasons: First, McClenning's remarks are vague. McClenning does not say when money will be received, how much money will be received or who will receive it. Second, McClenning, describing his role as a local union chairman, tells a good deal about his relationship with his co-workers:

> A local chairman is like a good bartender. A lot of guys will call and cry on your shoulder, and may call raising hell with you. By the time the conversation is over, they're asking you for help. So, I was upset, but I try not to let them know how upset I [sic] was and tried [sic] to encourage them that it wasn't dead, that we would continue. We were still going to fight for it.

(McClenning deposition at p. 246). Of course, a good bartender is also a source of a good story or two. McClenning admits that he painted a brighter picture for fellow employees. McClenning admits that he did this so that his fellow employees would not become discouraged. In fact, this entire quotation evidences the fact that McClenning is one of the employees. McClenning wanted to be found affected and displaced so that he could receive compensation just like the other employees. Plaintiff fails to prove collusion between McClenning and the general chairman or prove collusion between McClenning and the Burlington Northern Railroad.

Overall, the statements made by Union officials may have involved some puffing. They do not, however, tend to indicate that the Union, especially the Union hierarchy, lied or intentionally misled the employees.

B. *Plaintiffs claim that a lack of notice supports their claim of a breach of duty of fair representation.*

Several employees claim that the Union's lack of notice to the employees about the status of their claims constitutes a breach of fair representation. *See* Depositions K. Robertson, 15; D. Shrumanski, 25; R. L. McClure, 27; D. Looker, 34; D. Fisher, 23; D. Doolin, 30; K. Crisman, 25; T. Bell, 57. Standing alone, the failure to keep employees properly informed does not amount to a breach. Again, we refer to the standard imposed in this circuit: A union may have acted negligently or exercised poor judgment in failing to keep employees informed of the status of their grievance, but this is not sufficient to support a claim of unfair representation. *See Hardesty v. Essex Group, Inc.*, 550 F.

Supp. 752, 765 (N.D. Ind. 1982), (citing *Whitten v. Anchor Motor Freight, Inc.*, 521 F. 2d 1335, 1341 (6th Cir. 1975), *cert. denied* 425 U.S. 981 (1976).

Moreover, the record discloses that employees were not kept completely in the dark. For instance, the Union hierarchy provided local chairman McClenning a copy of the January 31, 1983, settlement in January (McClenning Dep. at 235) and in February, McClenning received a signed copy of the agreement. (McClenning Dep. at 244). While McClenning admits that he did not post the agreement (McClenning Dep. at 247 and Plaintiffs' reply to motion for summary judgment, Document 109, p. 16 and p. 6), he did give copies to those who were found "affected" and "displaced." (Plaintiffs' reply to motion for summary judgment, Document 109, p. 10). A copy was also given to Fishel when Fishel went to McClenning's home and demanded a copy. McClenning claims that his fellow employees were told about the award by word of mouth and that everyone knew about the settlement within one week. (McClenning Dep. at p. 249).

Plaintiffs additionally agree that McClenning passed information to the men through local union meetings which were generally sparsely attended. (Plaintiffs' reply to motion for summary judgment, Document 109, p. 6). McClenning says that four to five people usually showed up. (McClenning Dep. p. 215).

The fact that few members attended meetings is significant since according to the Union constitution, members were required to attend:

> Article 45 *Duties of Members*
>
> Members of the United Transportation Union are obligated . . . to attend all meetings of their local where reasonably possible to do so . . .

Constitution, United Transportation Union (1983). (Document 66, Plaintiffs' Motion to Compel Discovery). McClenning sums

it up best by saying "if they wanted to know, they would attend union meetings where business is handled." (McClenning Dep. at p. 248). While it does appear that the employees could have been kept better informed by the Union officer, this Court agrees that Plaintiffs themselves are partly to blame: they could have attended meetings or found out about their claims through their local union representative. Overall, the insufficiency of the notice provided does not amount to bad faith.

C. *The Union deliberately ignored customary rules of seniority in violation of its duty of fair representation.*

Plaintiffs allege that the Union discriminated on the basis of seniority in violation of the rule announced in *Zapp v. United Transportation Union*, 727 F. 2d 617, 628 (7th Cir. 1984). In *Zapp*, the union was found to have deliberately discriminated against employees of a small railroad in order to benefit employees of the larger Penn Central constituency. Here, Plaintiffs do not demonstrate any evidence of discrimination between a larger and smaller railroad.

Rather, Plaintiffs submit that the Union and Burlington agreement skipped employees and did not follow seniority order. (Depositions, R. Zillion, 18; Knight, 47, 55, 56; D. Doolin, 31; L. Antrim, 15). As McClenning points out, the employees were used to a merger protection agreement where there was total coverage. Normally, things were done in seniority order. (McClenning Dep. at 243).

The 1980 Burlington Northern and Frisco merger was different. An employee had to prove a transaction (diverted rail traffic) "affecting" the employee and "displacing" the employee. People at the other end of the line, out of town and not on call were not "affected." The employees were used to a system where, if the most senior man was "affected" and a newly hired man was "affected," everyone in between was assumed to be affected. However, in December 1980, not everyone was present to be affected and not everyone was

working on the PBF train found by neutral Dolnick to be the source of diverted rail traffic.

Plaintiffs show insufficient proof of discrimination on the basis of seniority. The disparity lies between employees of the local union. Some employees were both affected and displaced while others were not. There was no evidence advanced which demonstrates union favoritism towards those who received compensation and no evidence of union maliciousness towards those who did not receive compensation. Simply put, no one was alleged to be "on the outs" with the Union, a circumstance often viewed as leading to discrimination.

D. *Plaintiffs allege that United Transportation Union did not use all the information gathered at the hearing in breach of its duty of fair representation.*

In essence, Plaintiffs request a review of Public Law Board #3160, Award #67. Trainman N. Smith gave 20 pages of research and information to the United Transportation Union and claims only four pages were actually used. (Deposition of N. Smith, p. 38, 44). "The question, which obviously turns heavily on the particular facts of each case, is whether the union has 'not been guilty of malfeasance and [whether] its conduct was within the range of acceptable performance by collective-bargaining agent.'" *Baldini v. Local U. No. 1095 Intern. U. etc.*, 581 F. 2d 145, 151 (7th Cir. 1978), *citing Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 568, 96 S. Ct. 1048, 1058, 47 L. Ed. 2d 231 (1976). However, in *Baldini*, the union did not present four vital witnesses corroborating Baldini's alibi. Award #3160 shows that the United Transportation Union prepared for the confrontation with Burlington Northern and advanced each party's arguments. Furthermore, there is no evidence that the United Transportation Union intentionally did not use information.

In fact, perhaps the most compelling evidence against the employees is the findings of Public Law Board No. 3160,

Award No. 67, and the Special Board of Adjustment No. 918. The Union obviously conducted an investigation, pressed the claims through the process, brought the claims to arbitration, presented arguments on behalf of the employees at arbitration and successfully proved some diversion of rail traffic. The Union reached a settlement, and in addition the Union brought more claims before Special Board of Adjustment No. 918. The Union even went so far as to claim it made a mistake in the first public law board and tried to get the claims reopened but was unsuccessful. The Union's actions overall demonstrate a serious and time consuming consideration to the employees' claims.

E. *The January 31, 1983, settlement terminated employee rights in violation of the United Transportation Union's duty of fair representation.*

Affected employees were determined by one date, December 11, 1980, out of a two month period. Plaintiffs claim that picking one date discriminated against some of the employees. The Defendants argue that December 11, 1980, was the date that the first turn was eliminated on train PBF. McClenning says that the first turn was eliminated on December 1, 1980. (McClenning Dep., p. 259). The date ultimately has no significance. The Union admits it made a mistake by signing the agreement and tried to reopen Public Law Board #3160, Award #67 at Special Adjustment Board #918. However, the neutral refused to reopen Award #67 and the settlement.

Furthermore, Plaintiffs aid Defendants' argument when they stated "it is evident that the union saw its *mistake* in the agreement it entered into on January 31, 1983, and September 26, 1983, in determining the number of employees affected by the diversion. This is shown by their subsequent claims before Special Board of Adjustment No. 918." (Plaintiffs' reply motion to summary judgment, Doc. 129, p. 18) (emphasis added).

In addition, Plaintiffs were upset that the settlement of January 31, 1983, was only about train PBF. They felt that other trains should have been included:

> It is wrong for the union to now represent to this court that the arbitrator ruled that only the PBF train involved diversion. That was not the ruling of the arbitrator. In fact, the arbitrator clearly said that he did not have all the evidence concerning diversion before him. Clearly, the arbitrator in the Public Law Board No. 3160 wanted to know how many cars per month on the average were diverted from the Beardstown corridor. This precise question was posed by the arbitrator and the parties were instructed to determine that the union did nothing to determine that even though they had information showing far more cars were diverted than what the railroad presented to them. These cars were not supposed to be limited solely to the PBF train. How could you limit it to one train when in fact there had been six trains a day on the Beardstown corridor handling solely merchandise freight and which at the time of the agreement were gone?

(Document 129, Plaintiffs' reply to motion for summary judgment, p. 21-22). Neutral Dolnick, however, in Public Law Board No. 3160, Award No. 67, Case 16, List No. 2, page 8, clearly speaks of diversion by the PBF train and tells the parties to reach an agreement. Obviously, the employees thought that there was more diverted traffic and were familiar with the system where diverted rail traffic was much easier to prove. The frustration of fewer working hours and smaller paychecks due to less rail traffic through Beardstown is apparent through the depositions of the workers. The argument that there must be more rail traffic diverted seems logical. However, the Union says that the settlement truly made the most of a limited finding, and there is support from the Public Law Board No. 3160, Award No. 67, and the words of neutral Dolnick.

In summary, Plaintiffs fail to show deliberate misconduct by Hitz and United Transportation Union. Some of McClenning's acts might ordinarily be inferred to be deliberate misconduct. He did not post the settlement and award because he was embarrassed about how few employees were protected. He told "stories" to keep workers' spirits high so that they would

continue fighting. If McClenning "sold out" on his fellow employees (never alleged by Plaintiffs), he certainly did a poor job — his request for compensation was denied, too. McClenning is one of the union employee Plaintiffs, his affidavits show his reasons for his actions. If McClenning had any grievous faults, it was his tendency to be over-zealous and too optimistic. McClenning exhibits considerable empathy toward his coworkers and union brothers. In addition, Plaintiff's memo in reply to summary judgment is sympathetic to McClenning's position and outright admits McClenning's intentions.

There being no genuine issue of material fact, movants' motions for summary judgment are granted.

VI

As previously mentioned, in order to have jurisdiction in federal court, Plaintiffs had to maintain the breach of fair representation claim. The other federal claim, alleging breach of a contractual right, is a minor dispute and should be brought before an arbitration board. *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320, 92 S. Ct. 1562, 32 L. Ed. 2d 95 (1972). Therefore, this Court has no jurisdiction to hear Plaintiffs' Count I alleged against Burlington Northern for breach of the merger protection agreement.

In fact, most of Plaintiffs' allegations are minor contractual disputes calling for interpretation of the merger protection agreement over which an arbitral board has primary jurisdiction. Continuous references to Public Law Board No. 3160, Award No. 67 and Special Adjustment Board No. 918 proves that these claims deserve the expertise and attention the arbitral board offers.

Simply put, Plaintiffs are trying to find a "back door" that allows for review of an arbitrator's decision. Review of the adjustment board orders is limited to three specific grounds. *Union Pacific R. Co. v. Sheehan*, 439 U.S. 89, 93, 99 S. Ct. 399,

—, 58 L. Ed. 2d 354, — (1978). Since Plaintiffs did not request review, it is sufficient to simply allude to the fact that reasons for review of the agency's decision are quite narrow. A great deal of deference is given to the agency's decision.

VII

Plaintiffs agree that Count III alleged against United Transportation Union for negligence and Count IV alleged against United Transportation Union for negligent interference with Plaintiffs' contractual right both are preempted by the federal law claim of breach of a merger protection agreement.[1] However, Plaintiffs refuse to accede to movant's argument that Count V intentional inference with Plaintiffs' contractual right, and Count VI, wilfully and wantonly violating the duty of fair representation and causing a breach of contract with Burlington Northern, are also preempted by federal law.

Movant argues that Counts III through VI are all brought pursuant to this Court's pendent jurisdiction. "[W]hen all federal claims fall out before trial, as has occurred here, the district court should relinquish its pendent jurisdiction." *Graf v. Elgin, Joliet & Eastern Ry. Co.*, 790 F. 2d 1341 (7th Cir. 1986). *See, e.g., United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S. Ct. 1130, 1139, 16 L. Ed. 2d 218 (1966); *Blau Plumbing, Inc. v. S.O.S. Fix-It, Inc.*, 781 F. 2d 604, 611-12 (7th Cir. 1986). Since there is no federal claim remaining, this Court relinquishes jurisdiction over the pendent state law claims.

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1. Movant points out that in Illinois the third party beneficiaries cannot assert tortious interference without the right to contract. "All relevant precedent suggests that only direct parties to the contract, and not third party beneficiaries, maintain a tortious interference action." *Organ. of Minority Vendors v. Illinois Central Gulf R.R.*, 579 F. Supp. 574, 605 (N.D. Ill. 1983).

CONCLUSION

Defendants' motions for summary judgment are ALLOWED. This Court lacks jurisdiction on the remaining claims. Plaintiffs' motion to compel discovery is DENIED as moot.

Case CLOSED.

ENTER: August 21, 1987.

FOR THE COURT:

/s/ RICHARD MILLS
United States District Judge

(2)

No. 88-279

Supreme Court, U.S.
FILED
SEP 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, A.D., 1988

LESTER D. ANTRIM, ET AL.,

Petitioners,

VS.

BURLINGTON NORTHERN, INC., A CORPORATION, AND THE UNITED TRANSPORTATION UNION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT UNITED TRANSPORTATION UNION'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PAMELA D. WALKER
1700 First Commercial Building
Little Rock, Arkansas 72201
(501) 372-3363
Attorney for Respondent
United Transportation Union

TREVATHAN PRESS • LITTLE ROCK

QUESTIONS PRESENTED

1. There was no question in this case of the union's signing away job protection guaranteed by the Interstate Commerce Commission; there was no new protective agreement entered into. The real question presented by this case is whether plaintiffs can bring their grievance to another forum after having lost at arbitration, with their attorneys making the identical arguments in federal court that the union representatives made in arbitration.

2. The real question is not whether the plaintiffs in this case are entitled to have a jury pass on their claims rather than having them disposed of by summary judgment, but whether they have the right to have a jury pass on their claims after these claims have been disposed of by an arbitrator.

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IN THE

Supreme Court Of The United States

OCTOBER TERM, A.D., 1988

LESTER D. ANTRIM, ET AL.,

Petitioners,

VS.

BURLINGTON NORTHERN, INC., A CORPORATION,
AND THE UNITED TRANSPORTATION UNION,

Respondents.

RESPONDENT UNITED TRANSPORTATION UNION'S
OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

See Petitioner's brief.

JURISDICTION

See Petitioner's brief.

STATUTES INVOLVED

The appropriate citation for the Interstate Commerce Act's section on employee protective

arrangements quoted by plaintiffs is 49 U.S.C. §11347.

STATEMENT OF THE CASE

The defendant union agrees with the plaintiffs' statement of the facts through the first six paragraphs of their statement. The employees were covered by an employee protective agreement as of the date of the BN-Frisco merger, and the union did file claims that many of the employees were adversely affected by traffic being diverted from the BN to the former Frisco lines. However, the arbitrator found only **one** diverted train and ordered the union and the company to determine the affected and displaced employees. The arbitrator's opinion and the ultimate settlement of the employees to get protection were hardly secret. The General Chairman and International Vice President who handled the first arbitration kept in touch with the Local Union and sent the Local Chairman copies of the decision and the determination of affected and displaced employees within days. The Local Chairman announced the decision at the Local Union meetings and gave copies of the decision and affected employees determination to the affected employees. The Local Chairman stated in deposition that everyone knew about the decision and the settlement within a week. (App. p. 30) What the "men first learned on August 20, 1984," (P.'s brief p. 4) was that the **second** arbitration over protective pay for **later** lay-offs and pay loss was lost.

At this second arbitration the union could not prove any more diversion of traffic, but the union representatives tried to piggyback these later claims onto the earlier finding of diversion. They made all the arguments that plaintiffs' attorneys tried to make to the lower court on the merits of the plaintiffs' claims against the railroad. Unfortunately, the arbitrator did not agree. The real issue of the appeal of this case is whether the plaintiffs should have a chance to present to a jury the same arguments that the union submitted to the arbitrators.

REASONS FOR NOT GRANTING THE WRIT

I. THERE IS NO CONFLICT BETWEEN THE CIRCUIT COURT DECISION IN THIS CASE AND THE DECISIONS IN OTHER CIRCUITS.

Plaintiffs state that the Court of Appeals' decision in this case, *Antrim v. Burlington Northern, Inc., et al.* 847 F.2d 375 (7th Cir. 1988), conflicts with the following cases in other Circuits: *Richins v. Southern Pacific Co.*, 620 F.2d 761 (10th Cir. 1980); *Childs v. Brotherhood of Maintenance of Way Employees, et al.*, 831 F.2d 429 (3rd Cir. 1987); *Nemitz v. Norfolk & Western Co.*, 436 F.2d 841 (6th Cir.), *aff'd*, 404 U.S. 37 (1971); and *Bundy v. Penn Central Company*,455 F.2d 277 (6th Cir. 1972). However, the *Antrim* case does not conflict with any of these cases.

In *Richins* and *Childs* the Tenth and Third Circuits held that where the unions failed in their duty of fair representation, and the plaintiffs were prevented from making timely appeals to the National Railroad Adjustment Board in the processing of their grievances, the federal district courts could take jurisdiction over both the duty of fair representation claims against the unions and the breach of contract claims against the railroads. In the instant case, however, the district and circuit courts both declined to take jurisdiction over the breach of contract claim because there was a finding of no breach of the union's duty of fair representation,

there had been timely arbitration of plaintiffs' grievances, and plaintiffs had not sued to overturn such arbitration awards under 45 U.S.C. §153 First (q) of the Railway Labor Act. In fact, the district court in the instant case quite discerningly stated that,

> [s]imply put, Plaintiffs are trying to find a "back door" that allows review for an arbitrator's decision.

Appendix, p. 29.

In the Sixth Circuit decisions of *Nemitz, supra*, and *Bundy, supra*, the Court of Appeals did **not** rule that railroad workers could sue in federal district court under the Railway Labor Act, as plaintiffs have done, for damages resulting from a breach of a merger protective agreement. The court ruled that railroad workers could sue in federal district court under the Interstate Commerce Act for damages resulting from an implementing agreement which violates the Interstate Commerce Act. As has been previously stated, the union and the company did not "[rewrite] the job protection contract." No matter how plaintiffs mischaracterize the agreement which identifies the affected and displaced employees according to the arbitrator's ruling, that agreement is merely that, it is not a new implementing agreement. Furthermore, plaintiffs did not claim below that the arbitration settlement agreement was a new implementing agreement which violated the Interstate Commerce Act, nor did they file suit under 49 U.S.C. §11705 (c)(1). There is no conflict in these cases, they simply do not

involve the same issues.

II. The Case Was Properly Decided By Summary Judgment.

The plaintiffs/petitioners state that the trial court and the Court of Appeals below did not follow the standards of *Quinones v. United States*, 492 F.2d 1269 (3rd Cir. 1974), in granting a summary judgment to the defendants. The plaintiffs/petitioners make no argument, however, that the instant case does not follow the standards for granting summary judgment set by this Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Nothing has been shown by the plaintiffs to warrant a re-examination of these settled principles.

CONCLUSION

The courts below gave full consideration to the issues and decided them correctly. The allegedly "conflicting" decisions cited by the plaintiffs are not in conflict with the instant case. Nothing has been shown by the plaintiffs to warrant the exercise of this Court's extraordinary and discretionary jurisdiction.

The petition for writ of certiorari should be denied.

Respectfully submitted,

PAMELA D. WALKER
1700 First Commercial Building
Little Rock, Arkansas 72201
(501) 372-3363

Counsel for Respondent
United Transportation Union

Respondent's Appendix

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 88-279
LESTER D. ANTRIM, et al.,

Plaintiffs-Appellants,

v.

BURLINGTON NORTHERN, INC. and UNITED TRANSPORTATION UNION,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois,
Springfield Division
No. 84-3375--**Richard Mills,** *Judge.*

Argued March 29, 1988—Decided May 17, 1988

Before CUMMINGS, FLAUM, and EASTERBROOK, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* When the Burlington Northern Railroad acquired the St. Louis-San Francisco Railway in 1980, it had to provide for the protection of employees affected by the transaction. 49 U.S.C. §11347. It

negotiated with several unions, including the United Transportation Union (the Union), an agreement incorporating the *New York Dock* conditions, named after *New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979). The *New York Dock* conditions require the railroad to compensate its employees in the event the merger causes harmful diminution or diversion of traffic. The union or employee must demonstrate (1) diversion or diminution, (2) effect on the employee in question, and (3) detriment, which generally means wages lower than the the employee earned in a prior period. If the railroad rejects a request for compensation, the union may take the claim to arbitration under the Railway Labor Act, 45 U.S.C. §153 First (i), and if still dissatisfied may ask the Interstate Commerce Commission for review. *Chicago & North Western Transportation Co.-Abandonment-Near Dubuque and Oelwein, Ia.*, — I.C.C.2d. — (Apr. 17, 1987); *Atlantic Richfield Co. and Anaconda Co. — Control — Butte, Anaconda & Pacific R.R. and Tooele Valley R.R.*, — I.C.C. 2d — (Feb. 17, 1988). Judicial review is forbidden by 45 U.S.C. §153 First (q) unless the arbitrators failed to comply with the Railway Labor Act, exceeded their jurisdiction, or perpetrated "fraud or corruption." *Union Pacific R.R. v. Sheehan*, 439 U.S. 89 (1978). (The extent to which the ICC may (or must) review decisions in cases arising out of labor-protection conditions is the subject of pending petitions for judicial review, and we express no opinion on it.)

Some of the Union's members in central Illinois noticed that fewer and shorter trains were passing through their

territory after the merger, and they sought compensation. The Railroad replied that a downturn in business had caused the shortfall, and that the merger was not responsible. The Union disagreed. In April 1982 the Union and Railroad submitted some claims to the panel under the Railway Labor Act, in the expectation that the decision would set the pattern for similar claims. The majority of Public Law Board No. 3160 concluded that the merger led to the rerouting of a single daily train away from the territory in question and invited the parties to settle their dispute on that basis. In January 1983 they did so, signing an agreement designating ten employees as "affected" by the displacement of traffic, and eight of these ten as injured during the months covered by the award. Since the settlement, the eight have been receiving monthly benefits; some other employees also receive benefits under labor-protection agreements predating the 1980 merger. (These older agreements do not require proof that the lost work was attributable to the merger, but they apply only to employees working when the earlier mergers occurred.) No other employees have received payments on account of the 1980 merger or any reduction or displacement of traffic it may have have caused.

Many members of the local union were dissatisfied and continued to submit claims for compensation. These fall into three groups. (1) The two employees deemed "affected" by the rerouted train but not "displaced" during the months covered by the award sought compensation for other months when, they say, they had lost wages. (2) Employees not among the ten deemed "affected" by the rerouting contended that

they, too, had lost work as a result of the shift. (3) Still other employees continued to insist that the merger had rerouted more than one train out of their territory, and they wanted compensation for the loss they perceived. The record is unclear about which of these persons protested, when, and to whom; we need not resolve any disputes of this character. The Union asked the Railroad to recognize the validity of the claims; the Railroad refused, contending that the whole subject was closed by the January 1983 settlement.

In early 1984 the Union took a second group of cases to arbitration. It pressed claims in the first two categories, apparently abandoning hope of persuading a panel that more than one train had been diverted. Special Board of Adjustment No. 918 held in August 1984 that the earlier award, plus the settlement, disposed of all possible claims in the first two groups. Asked to set aside both the earlier decision and the settlement on a number of grounds, Board No. 918 refused. No one asked the ICC to review this decision, and none of the three grounds of judicial review is present.

The employees in central Illinois instead filed this class action in late 1984 against both the Union and the Railroad, contending that the Railroad violated the agreement of 1980, and the Union violated its duty of fair representation. This "hybrid" contract-duty of fair representation suit is governed by a six-month statute of limitations, and it is unlikely that the suit is timely, since as Board No. 918 held everything of substance was over and done with in January 1983. See *Bonds*

v. Coca-Cola Co., 806 F.2d 1324 (7th Cir. 1986). The district court nonetheless rejected the plaintiffs' claim on the merits, and as a defense based on the statute of limitations is not jurisdictional we need not reach the question, for we agree with the grounds on which the district court resolved the case.

This court has no power to review the merits of decisions of arbitral panels under the Railway Labor Act. See *Sheehan* and, e.g., *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320 (1972). A contention that the union violated its duty of fair representation questions the inputs into the arbitral process rather than the panels' decisions, however, and may be maintained under the jurisdiction granted by §301 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §185. *Czosek v. O'Mara*, 397 U.S. 25 (1970); *Graf v. Elgin, Joliet & Eastern Ry.*, 697 F.2d 771 (7th Cir. 1983)—at least to the extent it seeks relief against the Union, an important qualification to which we return.

As a suit against the Union, however, this case is doomed by *Graf* and the many other decisions of this court holding that only discrimination or other intentional misconduct violates the duty of fair representation. E.g., *Grant v. Burlington Industries*, 832 F.2d 76 (7th Cir. 1987); *Camacho v. Ritz-Carlton Water Tower*, 786 F.2d 242 (7th Cir. 1986), both collecting still more cases. The district court properly granted summary judgment to the Union, because there is no dispute about any *material* fact. Representation is "fair" even if ineffectual; the union may choose to devote resources to projects other than processing grievances, with the consequent

diminution in the quality of contract administration. Negligence, even gross negligence, is not "unfair" representation. Unless the union's hierarchy is out to get the complaining members—perhaps on prohibited grounds such as race, perhaps because of political squabbles within the union—a failure to handle a claim skilfully or successfully is not a source of legal liability.

The plaintiffs do not claim that the Union took their race, politics, or other prohibited criteria into account. It seems unlikely that internecine disputes account for the outcome; among the losers was the president of the local union, whose claims have been rejected consistently. The Union has gone to arbitration twice, the second time in an effort to extend the extent to which it had prevailed before the first panel. There is a genuine dispute about the cause of the diminished work in central Illinois; the first panel agreed with the Union in part and with the Railroad in part. The Union has not had the success for which its adherents hoped, but this is hardly a ground of liability. A union also might be liable to its members for dishonoring a more specific contractual promise, see James D. Holzhauer, *The Contractual Duty of Competent Representation*, 63 Chi.-Kent L. Rev. 255 (1987), but none has been urged in this case.

Perhaps the Union erred by basing the settlement of January 1983 on only two months' work, which forever denied benefits to two workers deemed "affected" but not "displaced" in those months and to any workers who were not "affected" in those months but could be in the future. But any

settlement is a compromise in which each side gets less than its maximum objective. The record contains nary a clue that this settlement was drafted as it was in order to disadvantage unpopular members of the union, or otherwise depended on forbidden grounds of action.

Plaintiffs' evidence of intentional misconduct (taken in the light most favorable to them) is principally a string of unfulfilled promises by the president of the local and the representative of the international, who kept urging the members to submit claims for benefits and implied they would get results. Exaggerated promises—perhaps in an effort to avoid unrest that might be reflected at the ballot box in union elections—are not the sort of "intentional" wrongdoing with which *Graf*, *Camacho*, and similar cases are concerned. Lying to its members (if that is what happened) is far removed from invidious discrimination among them. It is the use of forbidden grounds of decision that creates a legitimate claim of "unfair" representation. The other bits of evidence do not carry the day. The plaintiffs complain, for example, that the president of the local did not post the January 1983 settlement agreement but instead discussed it at a meeting. Edgar Allen Poe made a nice tale out of the stratagem of hiding something by putting it just where people would look first, and perhaps the president of the local had this in mind. Apparently the last place where the members of this local expect to receive important information is at a meeting—which may be why, the record discloses, the local's meetings are sparsely attended. Still, it is hardly a breach of duty of fair representation to suppose that information of general interest to the members

might be revealed at their meeting. The plaintiffs also insist that the Union's bad faith appears in the fact that the settlement agreement did not dole out benefits in seniority order. Doubtless many benefits go by seniority; the *New York Dock* conditions, however, direct benefits to those actually injured by rerouted or reduced traffic. The settlement agreement was an effort (whether successful is not our province to say) to implement an arbitral award applying *New York Dock*. That it did not implement some competing vision of how benefits ought to be awarded is irrelevant.

So the claim against the Union fails. We held in *Graf*, 697 F.2d at 781, and *Frandsen v. Brotherhood of Railway Clerks*, 782 F.2d 674, 684 (7th Cir. 1986), that when this happens, the claim against a railroad employer must be dismissed for want of jurisdiction. The district court followed that path. This means we can avoid a host of jurisdictional problems unique to hybrid contract-duty of fair representation litigation under the Railway Labor Act. A railroad is not an "employer" for purposes of §301, see 29 U.S.C. §152(2) and (3), so jurisdiction must come from elsewhere. In hybrid cases under §301, employers may be called on to pay the portion of the loss caused by their breach of contract, see *Bowen v. Postal Service*, 459 U.S. 212 (1983); *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976), yet under 45 U.S.C. §153 First (q) a court may not declare that the railroad *has* broken its contract unless one of the three conditions is satisfied, even if it otherwise has jurisdiction. *Czosek*, 397 U.S. at 29-30, therefore reserved the question whether a railroad employer may be held liable. The situation gets even knottier when primary

jurisdiction to review any disputes about the railroad's obligations lies in the ICC, see *United Transportation Union v. Norfolk & Western Ry.*, 822 F.2d 1114 (D.C. Cir. 1987); *Baustein v. Pan American World Airlines*, 828 F.2d 546, 549, 551-52 (9th Cir. 1987); *Zapp v. United Transportation Union*, 727 F.2d 617, 627 n.16 (7th Cir. 1984); *Augspurger v. Brotherhood of Locomotive Engineers*, 510 F.2d 853 (8th Cir. 1975). There may be federal-question jurisdiction, based on federal common law (see *Graf*, 697 F.2d at 776-77), when the union and railroad are in cahoots, see *Glover v. St. Louis-San Francisco R.R.*, 393 U.S. 324 (1969), but the extent of this jurisdiction is unclear at best—as is the question whether bare "jurisdiction" permits a remedy given §153 First (q)—and the proper rule when the ICC has primary jurisdiction is even murkier. The Railroad has presented these thorny questions for decision. Since the claim against the Union must be dismissed, any basis of jurisdiction over the Railroad dissolves, and we need not address other potential jurisdictional flaws.

AFFIRMED

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX II

IN THE
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

LESTER D. ANTRIM, et al., Plaintiffs,

v.

BURLINGTON NORTHERN, INC., et al., Defendants.

NO. 84-3375

ORDER

MILLS, District Judge:

In this cause of action, Plaintiffs allege a breach of their merger protection agreement with Burlington Northern Railroad. The action arises under 45 U.S.C. §151 *et seq.*, Chapter 8 of the Railway Labor Act, 28 U.S.C. §1331, and state law.

Plaintiffs are railway employees "including but not limited to firemen, conductors and brakemen of the Burlington Northern Railroad on or before November 21, 1980," and were granted class standing on July 29, 1985. Defendants are the United Transportation Union (Union)

and Burlington Northern, Inc. (Burlington).

Plaintiffs' complaint alleges that the Union, Plaintiffs' exclusive bargaining agent, breached an implied statutory duty of fair representation in its handling of their claims against Burlington. Plaintiffs also allege state law claims including: negligence, negligent and intentional interference with contractual rights, and knowing and willful inducement of Burlington's breach of contract.

Pursuant to Fed. R. Civ. P. 56, both Burlington and the Union have moved for summary judgment. Plaintiffs have requested oral argument on the motions and have moved for an order compelling further discovery. We do not believe oral argument will be helpful in resolving the issues before the Court; therefore, the motions are considered upon the parties' written filings.

I

As allowed by federal laws, Burlington and the Union signed a "merger protection agreement" (MPA) on March 25, 1980. The agreement essentially provided for the compensation of workers whose hours were reduced by a railroad merger that causes rail traffic to be diverted to another rail line. Such a merger in fact occurred here: the Burlington Northern and Frisco Railroads merged into Burlington Northern Railroad on November 21, 1980.

All of Burlington's employees were "covered" by the

MPA for a six year period. Nevertheless, in order to receive compensation for reduced work hours caused by the merger, a railroad employee is required by the agreement to prove three things: first, that the merger caused rail traffic to be diverted to another rail line (a "transaction"); second, that the employee was personally "affected" by the transaction; and third, that the affected employee was "displaced" (earning less income or placed in a worse position). (*See* Merger Protection Agreement and Implementing Agreement No. 1 between Burlington Northern, Inc., Frisco, and United Transportation Union, Doc. 1, Plaintiffs' complaint, Exhibit A).

Under the MPA, any aggrieved employee can submit a claim to the Burlington Northern Railroad. A rejected claim is then sent to the local union chairman who is required to forward the claim to the General Chairman of the Union. The Union and Burlington could then agree to arbitrate the claims before a Special Law Board or a Special Board of Adjustment.

In late 1980, employees of the Centralia-Beardstown-Galesburg line of the Burlington Northern began to notice a substantial decrease in rail traffic, and some submitted claims. These claims were forwarded to their local union representative, M. G. McClenning. Pursuant to the routine discussed above, McClenning processed these claims to G. D. Hitz, the General Chairman of the Union. The employees' claims were denied by Burlington on the ground that there was no diversion of rail traffic to another line; instead, the General Chairman concluded that rail traffic had declined

due to poor business conditions.

After its initial failure with Burlington, the Union decided to take "pilot" claims before Public Law Board #3160 on April 2, 1982. In a "pilot" claim, a union pursues the best claim, hopefully to a successful conclusion, and then settles other similarly situated parties based on the one successful claim. With respect to the pilot claim in issue, the Public Law Board—composed of a representative of Burlington Northern, a representative of the United Transportation Union, and a neutral party who cast the deciding vote—ordered the parties to attempt a settlement of the employees' grievance.

In a written decision, the Board reported the arguments advanced by both the Union and Burlington. The neutral party, Dolnick, writing for the Board, focused his findings of diverted traffic solely to train P.B.F., (Pacific Northwest to Kansas City-Memphis-Birmingham-and beyond) but stated that he did not have enough information to make a definite decision on the claim. Neutral Dolnick ordered the Union and Burlington to attempt to settle this particular claim in conformity with seniority rules. He retained jurisdiction for 120 days in the event no settlement was reached.

Subsequently, Burlington proposed a settlement to the United Transportation Union on January 31, 1983. Under the settlement, ten employees were found to be "affected" employees, and since all but two of these employees had earned less during this time, eight were also found to be

"displaced" employees entitled to compensation. It was agreed that the two employees not "displaced" should not receive compensation under the terms of the merger protection agreement. The Union's General Chairman Hitz agreed to this settlement. The Union, however, continued to ask employees to file their claims.

Near the end of 1983, some of the railroad employees retained legal representation. Counsel for the workers drafted a letter and sent it to Hitz on December 23, 1983. The letter spoke of the claim of R. E. Shores before Public Law Board #3160, but did not mention the settlement agreement of January 31, 1983. The letter demanded that the Union process the employees' claims in an expeditious manner so the claims could eventually be appealed.

In early 1984, the Union brought additional claims before Special Board of Adjustment No. 918, which rendered its decision on August 20, 1984. Among the claims resolved by the decision was Claim #2 of H. L. Fishel, one of the two men found "affected" by diverted rail traffic but not "displaced." The Union brought Fishel's claim based on the same diversion, and the same "affected" status, but alleged displacement for a different month when Fishel earned less and could properly allege "displacement." The board, however, rejected his claim, stating that the January 31, 1983, agreement between the Union and Burlington precluded any redetermination of Fishel's "displaced" status.

The Special Board of Adjustment #918 likewise rejected

claims by other Burlington employees. For instance, the claims of M. L. Smith, M. G. McClenning, H. D. Antrim, and E. M. Kroag—for displacement in *different* months after December 1980 and January 1981 but based upon the same diversion of traffic as found in P.L.B. #3160, Award #67—were denied. In rendering that board's decision, Neutral Edgett held that "the presentation of these claims to the board represents an effort to retry (Special Law Board #3160) Award #67 and to to disregard understandings which form the basis for the January 31, 1983, letter agreement."

The Union's presentation to the board included an appeal that both parties had overlooked information and that the award and letter agreement were subject to review. Neutral Edgett was not, however, persuaded that information had been overlooked, and refused to reopen P.L.B. #3160, Award #67. Plaintiffs filed the instant suit on September 19, 1984.

II

Burlington first argues that the union employees' claims are barred by the statute of limitations. Movant maintains that Plaintiffs reasonably should have known about the suit as of the January 31, 1983, agreement and that is the latest date the statute commences. We cannot agree with that date and we disagree that this claim is barred by the statute of limitations.

The Seventh Circuit has stated that:

> This circuit, other federal circuits and the National Labor Relations Board have all held that breach by labor union of its statutory duty of fairly representing members is an unfair labor practice under the National Labor Relations Act. *Hall v. Printing & Graphic Arts Union, Local No. 3*, 696 F.2d 494, 498 (7th Cir. 1982). Therefore, this Court applied to fair representation claims the limitation period for unfair labor practice complaints for the National Labor Relations Board. *Id.* The applicable statute states in pertinent part: provided . . . no complaint shall issue based upon unfair labor practice occurring more than six months prior to the filing of the charge with the board and a service of a copy thereof on the person against whom such charge is made . . . §10(b) National Labor Relations Act, 29 U.S.C. §160(b), *cited in*, *Metz v. Tootsie Roll Industries, Inc.*, 715 F.2d 299, 302 (7th Cir. 1983).

More recently, the Supreme Court has concluded that the six months statute of limitations is applicable against fair representation cases. *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151, 169, 103 S. Ct. 2281, 2290, 76 L. Ed.2d 476 (1983).

There is a standard which indicates exactly when there is notice of an alleged lack of fair representation. "The limitations period begins to run . . . when the claimant discovers, or *in the exercise of reasonable diligence should have*

discovered, the acts constituting the alleged [violation]." *Hungerford v. United States*, 307 F.2d 99, 102 (9th Cir. 1962), *cited in, Metz v. Tootsie Roll Industries, Inc.*, 715 F.2d 299, 304 (7th Cir. 1983).

Movants argue that the statute of limitations began to run based on the January 31, 1983, settlement agreement between Burlington and the Union. There is evidence favorable to movants for summary judgment that Plaintiffs had ample notice of the effects of Public Law Board #3160, Award #67 and the accompanying settlement between Burlington and the Union. For example, a copy of the settlement was sent to local chairman M. G. McClenning by the Union. McClenning gave copies to some of those found affected and displaced. H. L. Fishel received a copy by going to Mr. McClenning's home. McClenning told about the settlement at a sparsely attended local union meeting. McClenning told another union member orally about the nature of the settlement. Employees spread rumors about the settlement. Employees retained legal counsel and a letter was sent to the Union on December 23, 1983, urging that claims be processed. In essence, the employees probably knew about the settlement, but did not know the actual affect of the settlement.

The employees could find out about Neutral Dolnick's determination in #3160. However, the employees would have difficulty in discovering the subsequent settlement of January 31, 1983, by Burlington and the Union. In addition, the scope of the settlement was not determined until the findings of

Special Adjustment Board #918, Award #2 on August 20, 1984.

Plaintiffs persuade this Court that the statute of limitations begins later on August 20, 1984. Plaintiffs' argument rests upon the fact that the employees did not know about the settlement in #3160 until Special Adjustment Board #918. Plaintiff argues "the fallacy of the union's argument is clear since they in fact did not take pilot claims *on behalf of all the Plaintiffs back to the Special Adjustment Board #918* for the purpose of obtaining merger protection for the Plaintiffs." (Plaintiffs' reply to motion for summary judgment Document #129, pp. 25-26). This argument has a reasonable basis since the Union presented more claims and tried to reopen other claims related to the transaction found in Public Law Board #3160.

A lengthier discussion ahead describes the findings of the neutral Special Adjustment Board #918 and his refusal to reopen the findings of Public Law Board #3160 or review the settlement between Burlington Northern and the United Transportation Union. At this point, the Union is aware of, and the employees are capable of discovering, the true nature of the January 31, 1983, settlement between Burlington Northern and the United Transportation Union. It is here that the statute of limitations must begin. Otherwise, the employees are placed in the impractical position of interpreting the settlement prior to the findings of the Special Board of Adjustment #918.

Therefore, the claim of a lack of fair representation is not barred by the six months statute of limitations prescribed in *Del Costello*. Next, we turn to the claim that the employees lacked fair representation.

III

The employees claim that the Union breached its duty of fair representation. In addition, based on the lack of fair representation, the employees allege that Burlington acted in collusion with the Union to breach the merger protection agreement.

A union's duty of fair representation to its members is not explicitly found in any labor statute. Instead, the duty of fair representation is the result of much judicial interpretation of federal labor policies and §301 of the Labor Management Relations Act, 29, U.S.C. §185. See, *e.g.*, *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151, 164, 103 S. Ct. 2281, 2290, 76 L.Ed. 2d 476 (1983); ("[The duty] is implied under this scheme of the National Labor Relations Act"); *Vaca v. Sipes*, 386 U.S. 171, 182, 87 S. Ct. 903, 912, 17 L. Ed. 2d 842 (1967) ("the duty stands as a bulwark to prevent arbitrary union conduct against individuals stripped of individual forms of redress by the provisions of federal labor law"). *See*, *Frandsen v. Broth. of Ry., Airline & S.S. Clerks*, 782 F.2d 674, 678-79 (7th Cir. 1986).

The employees cannot bring a claim directly against Burlington because §301 of the Labor Management Relations

Act, 29 U.S.C. §185, does not apply to employers. *United Independent Flight Officers v. United Air Lines*, 756 F.2d 1274, 1283 (7th Cir. 1985). In addition, the Railway Labor Act states, in no uncertain terms, that employees must refer disputes to the National Railroad Adjustment Board, 45 U.S.C. §153, First (i), or may pursue arbitration through a law board or board of adjustment. 45 U.S.C. §153, Second.

Any minor disputes relating to the merger protection agreement are decided by the expertise of the Interstate Commerce Commission and are not under the jurisdiction of this Court. Still:

> A fair representation claim, regardless of its factual context, is by definition a "non-minor" dispute since it involved the implied *statutory* relationship between a union and those it represents rather than the actual *contractual* relationship over which the National Railway Arbitration Board has jurisdiction.

Frandsen v. Broth. of Ry., Airline & S.S. Clerks, 782 F.2d 674, 685 (7th Cir. 1986). Thus, although this court does not have jurisdiction over a "minor" dispute, we do hold jurisdiction to hear non-minor disputes such as the instant claim that the railroad employees were not fairly represented.

Therefore, to prevail against either the company or the Union (the employees) . . . also carry the burden of demonstrating a breach of fair representation by the Union.

Hines v. Anchor Motor Freight, 424 U.S. 554, 570-71 (1975). If the Railway Labor Act based duty of fair representation claim against the Union is dismissed, the claim against Burlington must also be dismissed. *United Indep. Flight Officers* at 1274, *citing Graf v. Elgin, Joliet & Eastern Ry. Co.*, 697 F.2d 771, 781 (7th Cir. 1983). *See Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320, 92 S. Ct. 1562, 32 L. Ed. 2d 95 (1972).

Moreover, the remaining state law claims would have no federal law claim on which to base pendent jurisdiction and this court would not have jurisdiction to hear the state law claims.

IV

The employees first assert that the Union misrepresented the progress of their claims under the merger protection agreement. In order to better understand the agreement itself, a brief review of the history of the merger protection agreement is helpful.

The history of protective provisions for employees of merging or consolidating rail carriers is recounted in *New York Dock Ry. v. United States*, 609 F.2d 83, 86-90 (2d Cir. 1979). In 1933, Congress enacted the Emergency Railroad Transportation Act which mandated a job freeze to guarantee continued employment for employees of consolidated railroads. Due to the effects this approach could have on operational efficiency, railroads and labor organizations agreed to a job security arrangement that provided bargaining

and compensation protection to employees, and allowed the railroads to reduce their work force. That agreement was the Washington Job Protection Agreement of 1936 (WJPA). In 1940, Congress amended the Interstate Commerce Act to include, *inter alia*, a labor protective provision modeled on the WJPA. 49 U.S.C. §5(2)(f). That section was extensively revised in 1978 and recodified at 49 U.S.C. §11347, *Crosby v. I.C.C.*, 741 F.2d 1077, 1079 (8th Cir.1984). The exact terms of the 1980 Burlington Northern and Union merger protection are modeled after 49 U.S.C. §11347 and the so-called "New York Dock conditions."

The primary issue before us is whether the Union's behavior was intentionally deceptive and breached a duty of fair representation.

As the exclusive bargaining agent, the Union has an implied statutory duty to "fairly and without hostility or discrimination represent [their] grievance[s]." *Vaca v. Sipes*, 386 U.S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967). In this circuit, *Hoffman v. Lonza, Inc.*, 658 F.2d 519 (7th Cir. 1981), sets forth the relevant legal standard used to determine a breach of duty of fair representation:

> *Hoffman* minimizes the occasions on which a federal district court has to take over the function of the arbitral boards and enforce a collective bargaining agreement. The court will do so only when the worker can prove intentional misconduct by the union in failing to prosecute

his grievance.

Graf v. Elgin, Joliet & Eastern Ry. Co., 697 F.2d 771, 781 (7th Cir. 1983). "*Hoffman* holds that a union breaches its duty to fairly represent a worker if it deliberately and unjustifiably refuses to represent that worker in processing a grievance. The union's misconduct must be intentional." *Superczynski v. P.T.O. Services, Inc.*, 706 F.2d 200, 202 (7th Cir. 1983).

Recently, the Seventh Circuit has again emphasized that several cases including *Graf*, *Superczynski*, and *Dober v. Roadway Express, Inc.*, 707 F.2d 292, 294 (7th Cir. 1983), hold that gross negligence alone is not a basis of liability. "A union may be liable if it discriminates against employees for forbidden reasons (such as race or politics, including the employee's position on the union and its leaders). It is not liable, however, for careless or boneheaded conduct." *Camacho v. Ritz-Carlton Water Tower*, 786 F.2d 242, 244 (7th Cir. 1986), *cert. denied*, — U.S. — , 106 S. Ct. 3282, 91 L. Ed. 2d 571 (1986).

Hoffman and other cases adopt a standard that precludes the courts from becoming embroiled in the merits of day-to-day employment decisions. The grievance and arbitration machinery is designed to place review in specialized tribunals.

Furthermore, the standard accommodates union employees such as Hitz and McClenning who have many duties in addition to handling grievances. They are not lawyers or private investigators. They may know the ins and outs of

the collective bargaining agreements without having a trial lawyer's skills. A union could secure the skills and perseverance of a good litigation team but they would have to pay the steep fees these skills command in the market. A union may choose to rely on part-time, untrained, overworked grievers—with the inevitable difference in the outcome of some cases—rather than purchase a higher quality of representation. Therefore, "a wide range of reasonableness must be allowed a statutory bargaining representative serving the unit it represents." *Id.* at 244, 245, *citing Ford Motor Co. v. Huffman*, 345 U.S. 330, 338, 73 S. Ct. 681, 686, 97 L. Ed. 1048 (1953).

Implicit in the Union's and Burlington's motion for summary judgment is that the Union's conduct was in no way deceitful. For the purpose of summary judgment, we must look closely at the assertions made by Plaintiffs in their affidavit. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Plaintiffs correctly maintain that the appropriate inferences must be drawn favorably to them:

> Where a choice of inference is possible from summary judgment materials, the inference must be drawn that favors the party resisting summary judgment. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59, 90 S. Ct. 1598, 26 L. Ed. 2d 142

> (1970); *United States v. Dieboldt, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962). We note also in this regard the sound axiom the questions of motive, design and intent are particularly inappropriate for summary adjudication.

Baldini v. Local U. No. 1095, Intern. U., etc., 581 F.2d 145, 151 (7th Cir. 1978). *See also Miller v. Gateway Transportation Co.*,616 F.2d 272 (7th Cir. 1980).

In the present situation, Plaintiffs believe there were several failures on the part of the union, and maintain that those failures rise to the level of fraud, deceit and dishonesty required for lack of fair representation claim. Yet most of the Plaintiffs' depositions simply state the legal conclusion that the Union did not fairly represent them; of course, this cannot govern the Court's decision.

Nevertheless, there are several more specific allegations that deserve closer scrutiny, particularly when viewed in light of the summary judgment standard. These include the allegations of lies and lack of notice; the allegation that Union officials deliberately ignored customary seniority rules; that the Union did not use all the information provided to it by employees; and that the January 31, 1983, settlement terminated all of employees' rights. Because of their importance to the issue of the Union's bad faith, we deal with each of the allegations in turn.

A. *Plaintiffs charge that Union officials lied to several employees.* First, Plaintiffs maintain that Union General Chairman Hitz lied to one of the Plaintiffs, H. Fishel, about Fishel's status after the Public Law Board #3160, Award 67 and the January 31, 1983, agreement. "He (Fishel) was, according to Mr. Hitz, an affected employee, thus Mr. Fishel waited relying on the [Union's] representations. Yet the decision of the Special Adjustment Board #918 confirmed that his rights had been terminated by the United Transportation Union." (Document 129, Plaintiff's reply to U.T.U., p. 11-12).

Admittedly, Fishel was an "affected" employee as that term was defined by the MPA; nevertheless, he earned too much money while "affected" and therefore did not qualify as a "displaced" employee. Hence, Fishel deserved no compensation for December 1980 and January 1981. Moreover, the Union did later bring Fishel's claims for subsequent months before Special Board of Adjustment #918. Under these circumstances, Hitz' statements cannot be interpreted as evidence of bad faith.

Plaintiffs also say that Hitz contradicts himself about the Union's ability to bring more claims. (Plaintiff Document 109, p. 12 footnote #3). At most, however, Plaintiffs merely misunderstood what Hitz was telling them. On the one hand, Hitz told the employees that there will "be another law board." (*See* Hitz Deposition, p. 47). Although Hitz recognized that the January 31, 1983, settlement and the subsequent interpretation of this agreement in Special

Adjustment Board #918 precluded bringing any claim related to the transaction of December 1980 and January 1981. During #918, the Union tried to reopen P.L.B. #3160 and the settlement but was not successful. Special Adjustment Board #918 held that additional claims may be brought.

Many employees said the Union lied to them about going back to the board after the initial settlement. Many of the reputed "lies" about what the Union planned to do, however, were merely misunderstandings resulting from gossip that abounded around the rail yard. As one employee, Richard Zillion expressed: "Some person is going to get this, and this person is going to get that, and nothing has ever materialized about anything. Rumors . . . nothing." (Zillion Deposition). A number of employees claimed that false information came from local representative McClenning. (Depositions of L. Schnake, 41; N. Smith, 33; R. Zillion, 20; P. Douglas, 36-37; K. Robertson, 19). McClenning admits that he told employees that the Union would continue to press their claims. (McClenning Deposition at 246, 247, 248, and 252). He did so on the basis of Hitz' statements to McClenning that the Union would go back to the Public Law Board. (McClenning Deposition, p. 247). This in fact occurred when the Union took "pilot" claims before the Special Board of Adjustment #918. Moreover, Hitz promised to take future claims, and McClenning told the employees to "keep filing," which they did. (McClenning Deposition, p. 200, 248, 250).

Another concern is that the Union, in their overzealousness, told people that they were all protected and

"taken care of." For example, Harry Fishel says that "Mr. Christiansen (the Union's Vice-Chairman) told me, and I quote, he said this is an ongoing thing and eventually he hopes to have everybody in Beardstown covered under the protection plan." (Fishel Deposition, p. 65). Of course, the word "hope" does not create the legitimate expectation that every employee will be covered by the MPA.

On the other hand, some of McClenning's remarks to employees are more specific. For instance, McClenning told several co-workers that the employees would get their "guarantees." (D. Schrumanski at p. 31, and Phelps at p. 26). However, McClenning's statements cannot support an inference of Union bad faith for two reasons: First, McClenning's remarks are vague. McClenning does not say when money will be received, how much money will be received or who will receive it. Second, McClenning, describing his role as a local union chairman, tells a good deal about his relationship with his co-workers:

> A local chairman is like a good bartender. A lot of guys will call and cry on your shoulder, and may call raising hell with you. By the time the conversation is over, they're asking you for help. So, I was upset, but I try not to let them know how upset I [sic] was and tried [sic] to encourage them that it wasn't dead, that we would continue. We were still going to fight for it.

(McClenning Deposition at p. 246). Of course, a good

bartender is also a good source of a good story or two. McClenning admits that he painted a brighter picture for fellow employees. McClenning admits that he did this so that his fellow employees would not become discouraged. In fact, this entire quotation evidences the fact that McClenning is one of the employees. McClenning wanted to be found affected and displaced so that he could receive compensation just like the other employees. Plaintiff fails to prove collusion between McClenning and the general chairman or prove collusion between McClenning and the Burlington Northern Railroad.

Overall, the statements made by Union officials may have involved some puffing. They do not, however, tend to indicate that the Union, especially the Union hierarchy, lied or intentionally misled the employees.

B. *Plaintiffs claim that a lack of notice supports their claim of breach of duty of fair representation.*

Several employees claim that the Union's lack of notice to the employees about the status of their claims constitutes a breach of fair representation. *See* Depositions K. Robertson, 15; D. Schrumanski, 25; R. L. McClure, 27; D. Looker, 34; D. Fisher, 23; D. Doolin, 30; K. Crisman, 25; T. Bell, 57. Standing alone, the failure to keep employees properly informed does not amount to a breach. Again, we refer to the standard imposed in this circuit: A union may have acted negligently or exercised poor judgment in failing to keep employees informed of the status of their grievance, but this is not

sufficient to support a claim of unfair representation. *See Hardesty v. Essex Group, Inc.*, 550 F. Supp. 752, 765 (N.D. Ind. 1982), citing *Whitten v. Anchor Motor Freight, Inc.*, 521 F.2d 1335, 1341 (6th Cir.1975), *cert. denied* 425 U.S. 981 (1976).

Moreover, the record discloses that employees were not kept completely in the dark. For instance, the Union hierarchy provided local chairman McClenning a copy of the January 31, 1983, settlement in January (McClenning Dep. at 235) and in February, McClenning received a signed copy of the agreement. (McClenning Dep. at 244). While McClenning admits that he did not post the agreement (McClenning Dep. at 247 and Plaintiffs' reply to motion for summary judgment, Document 109, p. 16 and p. 6), he did give copies to those who were found "affected" and "displaced" (Plaintiffs' reply to motion for summary judgment, Document 109, p. 10). A copy was also given to Fishel when Fishel went to McClenning's home and demanded a copy. McClenning claims that his fellow employees were told about the award by word of mouth and that everyone knew about the settlement within one week. (McClenning Dep. at p. 249).

Plaintiffs additionally agree that McClenning passed information to the men through the local union meetings which were generally sparsely attended. (Plaintiffs' reply to motion for summary judgment, Document 109, p. 6). McClenning says that four or five people usually showed up. (McClenning Dep. p. 215).

The fact that few members attended meetings is

significant since according to the Union constitution, members were required to attend:

> Article 45 *Duties of Members*
>
> Members of the United Transportation Union are obligated . . . to attend all meetings of their local where reasonably possible to do so . . .

Constitution, United Transportation Union (1983). (Document 66, Plaintiffs' Motion to Compel Discovery). McClenning sums it up best by saying "if they wanted to know, they would attend union meetings where business is handled." (McClenning Dep. at p. 248). While it does appear that the employees could have been kept better informed by Union officers, this Court agrees that Plaintiffs themselves are partly to blame: they could have attended the meetings or found out about their claims through their local union representative. Overall, the insufficiency of the notice provided does not amount to bad faith.

C. *The Union deliberately ignored customary rules of seniority in violation of its duty of fair representation.*

Plaintiffs allege that the Union discriminated on the basis of seniority in violation of the rule announced in *Zapp v. United Transportation Union*, 727 F.2d 617, 628 (7th Cir. 1984). In *Zapp*, the union was found to have deliberately discriminated against employees of a small railroad in order to benefit employees of the larger Penn Central constituency.

Here, Plaintiffs do not demonstrate any evidence of discrimination between a larger and a smaller railroad.

Rather, Plaintiffs submit that the Union and Burlington agreement skipped employees and did not follow seniority order. (Depositions, R. Zillion, 18; Knight, 47, 55, 56; D. Doolin, 31; L. Antrim, 15). As McClenning points out, the employees were used to a merger protection agreement where there was total coverage. Normally, things were done in seniority order. (McClenning Dep. at 243).

The 1980 Burlington Northern and Frisco merger was different. An employee had to prove a transaction (diverted rail traffic) "affecting" the employee and "displacing" the employee. People at the other end of the line, out of town and not on call were not "affected." The employees were used to a system where, if the most senior man was "affected" and a newly hired man was "affected," everyone in between was assumed to be affected. However, in December 1980, not everyone was present to be affected and not everyone was working on the PBF train found by neutral Dolnick to be the source of diverted rail traffic.

Plaintiffs show insufficient proof of discrimination on the basis of seniority. The disparity lies between employees of the local union. Some employees were both affected and displaced while others were not. There was no evidence advanced which demonstrates union favoritism towards those who received compensation and no evidence of union maliciousness towards those who did not receive

compensation. Simply put, no one was alleged to be "on the outs" with the Union, a circumstance often viewed as leading to discrimination.

D. *Plaintiffs allege that United Transportation Union did not use the information gathered at the hearing in breach of its duty of fair representation.*

In essence, Plaintiffs request a review of Public Law Board #3160, Award #67. Trainman N. Smith gave 20 pages of research and information to the United Transportation Union and claims only four pages were actually used. (Deposition of N. Smith, p. 38, 44). "The question, which obviously turns heavily on the particular facts of each case, is whether the union has 'not been guilty of malfeasance and [whether] its conduct was within the range of acceptable performance by collective-bargaining agent.' " *Baldini v. Local U. No. 1095 Intern U. etc.*,581 F.2d 145, 151 (7th Cir. 1978), *citing Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 568, 96 S. Ct. 1048, 1058, 47 L. Ed. 2d 231 (1976). However, in *Baldini*, the union did not present four vital witnesses corroborating Baldini's alibi. Award #3160 shows that the United Transportation Union prepared for the confrontation with Burlington Northern and advanced each party's arguments. Furthermore, there is no evidence that the United Transportation Union intentionally did not use information.

In fact, perhaps the most compelling evidence against the employees is the findings of Public Law Board No. 3160, Award #67, and the Special Board of Adjustment No. 918.

The Union obviously conducted an investigation, pressed the claims through the process, brought the claims to arbitration, presented arguments on behalf of the employees at arbitration and successfully proved some diversion of rail traffic. The Union reached a settlement, and in addition the Union brought more claims before Special Board of Adjustment No. 918. The Union even went so far as to claim it made a mistake in the first public law board and tried to get the claims reopened but was unsuccessful. The Union's actions overall demonstrate a serious and time consuming consideration to the employees' claims.

E. *The January 31, 1983, settlement terminated employee rights in violation of the United Transportation Union's duty of fair representation.*

Affected employees were determined by one date, December 11, 1980, out of a two month period. Plaintiffs claim that picking one date discriminated against some of the employees. The Defendants argue that December 11, 1980, was the date that the first turn was eliminated on train PBF. McClenning says the first turn was eliminated on December 1, 1980. (McClenning Dep., p. 259). The date ultimately has no significance. The Union admits it made a mistake by signing the agreement and tried to reopen Public Law Board #3160, Award #67 at Special Adjustment Board #918. However, the neutral refused to reopen Award #67 and the settlement.

Furthermore, Plaintiffs aid Defendants' argument when they stated "it is evident that the union saw its *mistake* in the

agreement it entered into on January 31, 1983, and September 26, 1983, in determining the number of employees affected by the diversion. This is shown by their subsequent claims before Special Board of Adjustment No. 918." (Plaintiffs' reply motion to summary judgment, Doc. 129, p. 18) (emphasis added).

In addition, Plaintiffs were upset that the settlement of January 31, 1983, was only about train PBF. They felt that other trains should have been included:

> It is wrong for the union to now represent to this court that the arbitrator ruled that only the PBF train involved diversion. That was not the ruling of the arbitrator. In fact, the arbitrator clearly said that he did not have all the evidence concerning diversion before him. Clearly, the arbitrator in the Public Law Board No. 3160 wanted to know how many cars per month on the average were diverted from the Beardstown corridor. This precise question was posed by the arbitrator and the parties were instructed to determine that the union did nothing to determine that even though they had information showing far more cars were diverted than what the railroad presented to them. These cars were not supposed to be limited solely to the PBF train. How could you limit it to one train when in fact there had been six trains a day on the Beardstown corridor handling solely merchandise

freight and which at the time of the agreement were gone?

(Document 129, Plaintiffs' reply to motion for summary judgment, p. 21-22). Neutral Dolnick, however, in Public Law Board No. 3160, Award No. 67, Case 16, List No. 2, page 8, clearly speaks of diversion by the PBF train and tells the parties to reach an agreement. Obviously, the employees thought that there was more diverted traffic and were familiar with the system where diverted rail traffic was much easier to prove. The frustration of fewer working hours and smaller paychecks due to less rail traffic through Beardstown is apparent through the deposition of the workers. The argument that there must be more rail traffic diverted seems logical. However, the Union says that the settlement truly made the most of a limited finding, and there is support from the Public Law Board No. 3160, Award No. 67, and the words of neutral Dolnick.

In summary, Plaintiffs fail to show deliberate misconduct by Hitz and United Transportation Union. Some of McClenning's acts might ordinarily be inferred to be deliberate misconduct. He did not post the settlement and award because he was embarrassed about how few employees were protected. He told "stories" to keep workers' spirits high so that they would continue fighting. If McClenning "sold out" on his fellow employees (never alleged by Plaintiffs), he certainly did a poor job—his request for compensation was denied, too. McClenning is one of the union employee Plaintiffs, his affidavits show his reasons for his actions. If

McClenning had any grievance faults, it was his tendency to be over-zealous and too optimistic. McClenning exhibits considerable empathy toward his co-workers and union brothers. In addition, Plaintiff's memo in reply to summary judgment is sympathetic to McClenning's position and outright admits McClenning's intentions.

There being no genuine issue of material fact, movants' motions for summary judgment are granted.

VI

As previously mentioned, in order to have jurisdiction in federal court, Plaintiffs had to maintain the breach of fair representation claim. The other federal claim, alleging breach of a contractual right, is a minor dispute and should be brought before an arbitration board. *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320, 92 S. Ct. 1562, 32 L. Ed. 2d 95 (1972). Therefore, this Court has no jurisdiction to hear Plaintiffs' Count I alleged against Burlington Northern for breach of the merger protection agreement.

In fact, most of the Plaintiffs' allegations are minor contractual disputes calling for interpretation of the merger protection agreement over which an arbitral board has primary jurisdiction. Continuous references to Public Law Board No. 3160, Award No. 67 and Special Adjustment Board No. 918 proves that these claims deserve the expertise and attention the arbitral board offers.

Simply put, Plaintiffs are trying to find a "back door" that allows for review of an arbitrator's decision. Review of the adjustment board orders is limited to three specific grounds. *Union Pacific R. Co. v. Sheehan*, 439 U.S. 89, 93, 99 S. Ct. 399, —, 58 L. Ed. 2d 354, — (1978). Since Plaintiffs did not request review, it is sufficient to simply allude to the fact that reasons for review of the agency's decision are quite narrow. A great deal of deference is given to the agency's decision.

VII

Plaintiffs agree that Count III alleged against United Transportation Union for negligence and Count IV alleged against United Transportation Union for negligent interference with Plaintiffs' contractual right both are pre-empted by the federal law claim of breach of a merger protection agreement.[1] However, Plaintiffs refuse to accede to movant's argument that Count V inference with Plaintiffs' contractual right, and Count VI, willfully and wantonly violating the duty of fair representation and causing a breach of contract with Burlington Northern, are also pre-empted by federal law.

Movant argues that Counts III through VI are all brought pursuant to this Court's pendent jurisdiction. "[W]hen all federal claims fall out before trial, as has occurred here,

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[1] Movant points out that in Illinois the third party beneficiaries cannot assert tortious interference without the right to contract. "All relevant precedent suggests that only direct parties to the contract, and not third party beneficiaries, maintain a tortious interference action." Organ. of Minority Vendors v. Illinois Central Gulf R.R., 579 F. Supp. 574, 605 (N.D. Ill. 1983).

the district court should relinquish its pendent jurisdiction." *Graf v. Elgin, Joliet & Eastern Ry. Co.*, 790 F.2d 1341 (7th Cir. 1986). *See, e.g., United Mine Workers v. Gibbs*, 383 U.S. 715, 726 86 S. Ct. 1130, 1139, 16 L. Ed. 2d 218 (1966); *Blau Plumbing, Inc. v. S. O. S. Fix-It, Inc.*, 781 F. 2d 604, 611-12 (7th Cir. 1986). Since there is no federal claim remaining, this court relinquishes jurisdiction over the pendent state law claims.

CONCLUSION

Defendants' motions for summary judgment are ALLOWED. This Court lacks jurisdiction on the remaining claims. Plaintiffs' motion to compel discovery is DENIED as moot.

Case CLOSED.

ENTER: August 21, 1987.

FOR THE COURT:

/s/ RICHARD MILLS
United States District Judge